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Court of Appeals, District of Columbia.

APRIL TERM, 1902.

No. 1168. **130**

THE BALTIMORE AND POTOMAC RAILROAD COMPANY AND THE PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY, APPELLANTS,

vs.

CATHERINE LANDRIGAN, ADMINISTRATRIX OF THE ESTATE OF THOMAS J. LANDRIGAN, DECEASED, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

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CATHERINE LANDRIGAN, ADMINISTRATRIX OF THE ESTATE OF THOMAS J. LANDRIGAN, DECEASED.

BRIEF FOR APPELLANTS.

This is an appeal from a judgment of the supreme court of the District of Columbia in an action by the widow and administratrix of Thomas J. Landrigan, deceased, to recover damages claimed to have been sustained by his death through the alleged negligence of the appellants, the defendants below.

STATEMENT OF FACTS.

The plaintiff's intestate, Thomas J. Landrigan, an employé of the defendants, while temporarily away from his post of

duty on Sunday evening, August 28, 1898, shortly before midnight, voluntarily went under the closed safety gates at the southwest intersection of South Capitol street and Virginia avenue, stood upon or dangerously near one of the defendants' tracks at said crossing, and was almost instantly struck and run over by a passing car or train, receiving injuries from which he died the following morning.

At the time of the accident, and for about eight years prior thereto, Landrigan had been employed by the defendant The Baltimore and Potomac Railroad Company as a machinist and assistant boss at its round or engine house, which was located near South Capitol and I streets, about two squares southeast of the crossing in question (31). He was on the night force, and it was customary for the men engaged in night work to take an hour off for lunch between twelve and one o'clock midnight. At the time of the accident, and for several years before that date, Landrigan lived on the north side of Virginia avenue, northwest of the southwest crossing of South Capitol street. The most direct route to his house was up South Capitol street to the southwest crossing, thence across the tracks to the north side of Virginia avenue. On the night in question he left his work at the round-house or machine shops about 11.50 p. m., and a few minutes after 12 o'clock was found near the southwest crossing in an injured condition.

South Capitol street at its intersection with Virginia avenue was divided by a parking or open space into two crossings—the southwest and southeast crossings—which were about fifty feet apart. At both crossings the defendants maintained safety gates and attendant gatemen. On the southwest side of the southwest crossing a fence extended up to the gates, so that when the gates were closed or lowered they completely shut off the railroad tracks from the footway used by pedestrians. The gates at the southwest crossing were operated by a gateman, whose box was situated

at the northeast corner of said crossing and opposite the side from which Landrigan approached.

On Virginia avenue, at its intersection with South Capitol street, the defendant company maintained and used four tracks—the most northerly, called the "reservation" or "No. 1" track, being used for freight and shifting purposes; the two intermediate tracks by north and south bound passenger trains, and the most southerly of the four, called the "lead" or "ladder" track, was also used in the shifting operations at this point. This "ladder" track was so called because it was a straight track, running from a point a square and a half west of the southwest crossing completely through the railroad yards of the company to the east. Every other track in the yard connected with it, and all the switches led into it (8). The eastern portion of it was constantly used for shifting, but the west end—that part of the track west of the southwest crossing of South Capitol street—while used for shifting purposes when occasion required, was more frequently used for the storing of cars containing coal and other material until such cars could be unloaded.

East of South Capitol street were the "Jersey yards," containing about sixteen tracks (14), which were used for storing freight and passenger cars of all descriptions, for loading and unloading freight, and for making up trains. A little to the southeast of this crossing was the "engine yard," which embraced all of the tracks leading to the engine or round house. West of the crossing were what is known as the property yards of the company, in which cars containing materials for the company's use were temporarily placed (14). In the "Jersey yards" immediately to the east of this crossing all of the freight and passenger trains were made up, and shifting operations were going on there almost continuously day and night. West of this crossing the tracks connected with the defendant's freight station at Ninth street and Maryland avenue, its passenger

depot at Sixth and B streets, and the main lines leading to the South.

On the night in question, for some hours before midnight, a shifting crew of the defendants had been engaged in making up a train of passenger coaches to carry troops to the South. In the course of their operations it was found necessary to back into one of the storage tracks in the "Jersey yards" to get out a Pullman sleeper called the "Lylete," which was standing there (14). In doing so, a tourist car, fitted with what is known as a Miller coupler, was found to be in juxtaposition with this Pullman car, which contained a Janney coupler. These two types of couplers were not designed to couple together, being of different formation and one being higher than the other. To get the Pullman car out, an emergency coupling was made by using a link and pin, an ordinary coupling pin being inserted in the holes in the Miller and Janney couplers respectively, and these pins being then connected with a link. On drawing the cars out of the side track on to the "ladder" track a slacking or running together of the cars occurred, which caused the link to twist over the head of one of the pins, as a result of which the cars parted, and the Pullman car, being the last car of the draft, began to move down the slight grade on the "ladder" track towards South Capitol street. At the time the car broke away it had a light in each end and was equipped with the usual brakes. One of the brakemen had tried the brakes on the car before it was pulled out on the straight track, and they then appeared to work all right (13); but after it became detached from the other cars and started down the grade, the brakes would not hold (13). Members of the train crew attempted to put on the brakes at both ends of the car, but finding that they would not respond, and that the momentum of the car was increasing, they jumped off and followed it down to the crossing at South Capitol street. The car passed over both crossings, and was brought to a standstill

west of the southwest crossing by running into two flat cars containing stone or gravel, which were standing on the western end of the "ladder" track.

There was no eyewitness to the injury inflicted upon plaintiff's intestate, and no conclusive evidence as to exactly where he was on the crossing when struck or what struck him, but the case was tried by the plaintiff upon the theory that Landrigan was run over by the runaway car while he was standing either upon or by the side of the "ladder" track. Counsel for the plaintiff admitted that Landrigan went under the closed safety gates and stood either on or by the side of this track (19). After the runaway car had passed South Capitol street he was found by the railroad men lying a few feet west of the southwest crossing and south of the "ladder" track. While lying there he said that he "came under the gates, and something struck me, and a whole string of cars ran over me" (15).

To reach the south or "ladder" track, Landrigan, after passing under the gates, crossed a clear space fifteen or twenty feet wide between the gate and the nearest rail of the track. The crossing was lighted by the ordinary street lamps, and there was an electric light on the northeast side of the crossing, about seventy-five yards distant (10). The view to the east along the "ladder" track from a point at the gate or just inside of it on this intervening space was unobstructed (18, 27, 29). The light in the approaching car could have been seen by any one looking in that direction (10). A passenger engine, referred to in the testimony as "Fenton's engine," was standing upon the most northerly of the four tracks at the southwest crossing and about ten yards west of it (12). This engine was partly on the crossing and about opposite the point where Landrigan was found (15). A train known as No. 78, the midnight passenger express for New York, was due at this crossing about

11.55 p. m. This train passed along the north-bound main track, which was immediately adjacent to the south or "ladder" track. The runaway car and train No. 78 reached the crossing almost simultaneously, the runaway car having about gotten across when the engine of No. 78 began to cross (16).

To avoid the conclusion of law that the plaintiff's intestate was guilty of contributory negligence in going under the closed safety gates and standing either upon or dangerously near the "ladder" track, as she admitted, the plaintiff attempted to prove that the western end of this track, near the southwest crossing, was rusty from disuse and was not used for shifting purposes, but simply as a place to store cars containing material belonging to the company; that the gates at this crossing were customarily kept down from 11 o'clock at night until the early hours of the morning, without regard to the approach of trains, cars, or locomotives, and consequently when so lowered they were not an indication of danger to persons about to cross the tracks at this point.

The court, in addition to submitting to the jury the question whether or not the defendants were negligent in the three particulars claimed by the plaintiff, to wit, in coupling the cars, in having a car on which the brakes were out of order, and in not having a sufficient light on said car (38), also instructed the jury that if they found that the gates were customarily kept down at night, without regard to the approach or presence of a car, train, or locomotive, and that plaintiff's intestate had knowledge of that fact, as contended by the plaintiff, then the fact that they were down at and just previous to the time of the accident was not of itself a warning to him of the presence of danger (39). The court also allowed the jury to find from the evidence whether plaintiff's intestate was guilty of contributory negligence in standing upon or near the "ladder" track.

The jury, as juries not infrequently do in cases where corporations are defendants, solved all doubt as to the existence of negligence or contributory negligence in favor of the plaintiff by returning a verdict for $6,500 against both defendants.

ASSIGNMENT OF ERRORS.

The trial court erred as follows:

1. In refusing, upon the whole evidence, to direct a verdict for the defendants.

2. In refusing to charge, as matter of law, that the safety gates at the crossing in question, when closed or lowered, were a notice or warning to all persons approaching said crossing that trains, cars, or engines were about to pass upon or over all or some of the tracks at said crossing, and that if the plaintiff's intestate met his death by disregarding such notice or warning and going under said safety gates when so closed or lowered, the plaintiff could not recover.

3. In granting the plaintiff's second prayer (32, 38), which instructed the jury that if they found that the gates were generally kept down from a late hour at night until early in the morning, and that the plaintiff's intestate had knowledge of that fact, then the fact that the gates were down at the time of the accident was not of itself warning to him of the presence of danger.

4. In refusing to charge, as matter of law, that the plaintiff's intestate was guilty of negligence in going under the closed gates and voluntarily placing himself in a position of danger.

5. In refusing to charge, as matter of law, that the plaintiff's intestate, in standing upon or dangerously near the

south or "ladder" track of the defendants at the crossing in question, was guilty of such negligence as would bar any recovery of damages by his administratrix in this action.

6. In charging that, in the absence of all evidence tending to show whether the plaintiff's intestate stopped, looked, and listened before attempting to cross defendants' south or "ladder" track, the presumption was that he did so.

POINTS AND AUTHORITIES.

I.

The important question to be determined in order to reach a decision in this case is what was the direct and proximate cause of the injury to the plaintiff's intestate? Was it caused by the servants of the defendants in failing to securely couple the runaway car, assuming that it was not safely coupled, or were Landrigan's injuries the result of his own voluntary exposure of himself to peril in going under the closed gates and standing upon or near the ladder track or any of the other tracks at said crossing?

Whatever negligence there may have been on the part of the employés of the company in the particulars claimed by the plaintiff—in failing to have the brakes upon the car in good working order, or in not securely coupling it, or providing a light on the advancing end—occurred prior to Landrigan's exposure of himself to danger.

Landrigan stated to the men who went to his assistance immediately after the accident happened that he came under the gates, something struck him, and a whole string of cars ran over him, showing that there was no appreciable interval between the act of going under the gates and the time when he was struck by the car. Train No. 78 reached the crossing at about 11.55 p. m. Landrigan, who was a railroad man and undoubtedly familiar with the defend-

ant's schedule of its regular trains, who had crossed at this very place at this hour of the night for a number of years, reached the crossing about the time No. 78 was approaching, went under the gates, and was struck either by it or by the runaway car. His exposure to danger, therefore, and the injury were almost simultaneous. His own act was the direct, immediate, and proximate cause of his injury. The act of the crew of the yard engine in not securely coupling the car was at most but the indirect and remote cause.

The distinction between remote and proximate causes is clearly defined. Whenever two causes unite to produce a given result, one of which is responsible and controlling and the other merely incidental to and set in motion by the other, the controlling cause is regarded as the proximate cause, although it may not be the nearer in point of time. But where the two causes are separate and independent, then that cause which is the nearest in point of time to the exposure is regarded as the proximate and direct cause, and the other as secondary and remote.

Insurance Company *vs.* Boon, 95 U. S., 130, 131.
Scheffer *vs.* Railroad Company, 105 U. S., 249.
W. & G. R. R. *vs.* Hickey, 166 U. S., 528.

In the case of Cullen *vs.* Railroad Company (8 D. C. Appeals, 69), which possesses many points of similarity to the case at bar, a boy after running around the closed gates of the defendant company, in attempting to cross the tracks, stumbled in a hole in the planking between the rails and was knocked down and run over by an engine of the defendant. It was claimed that the defendant was negligent in allowing the hole to remain in the crossing, in failing to give notice of the approach of the engine, and in the failure of the engineer to keep a lookout ahead. But this court said that all of these acts of negligence had occurred before the exposure of the deceased to danger and afforded no ex-

cuse for his contributory negligence. The following extract from the opinion of the court is particularly applicable:

"The acts of negligence on the part of the defendant relied upon in this cause to relieve the deceased from the consequences of his own contributory negligence, are the primary and only acts of negligence charged against the defendant in the first instance, namely, the absence of a fence, an unlawful rate of speed, and the fact that the engineer was not looking in the proper direction. These had all supervened before the exposure of himself to danger by the deceased; and it seems to us that it would be a perversion of the law of negligence to hold that, because they were continued after the deceased had exposed himself to danger, and without the occurrence of anything which would give notice or knowledge of such exposure, yet the fact of the exposure changed the character of the defendant's action from negligence to recklessness" (Op., p. 74).

If the negligence of the defendants was not the proximate cause of the injury to the plaintiff's intestate, it would seem to be unnecessary to consider this question, or at least to give it more than passing notice.

As a matter of fact, there was a light upon the advancing end of the runaway car, which might have been seen by Landrigan had he looked to the east—the direction from which the car was approaching (15, 16, 30). This light was more brilliant than an ordinary lantern and illuminated the end of the car (10, 16).

The brakes were not shown to be defective. They were tested by the brakeman before the car was taken out of the side track and found to work all right (13). After the car, which was a heavy Pullman sleeper and not an ordinary passenger coach, parted from the draft of cars to which it was attached and began to gain headway in running down the incline towards South Capitol street, the brakes then refused to hold (11, 13).

The cars separated, not as a result of a defective coupling, but because of the parting—not the breaking—of a tempo-

rary coupling made in an emergency to move the cars from one track to another in the yard of the railroad company, where no one was expected to be but the employés of the company. The two cars contained couplers of different construction, as frequently happened then with foreign cars (9); they were not designed to couple together, and the ordinary and usual way of uniting such couplers was the means adopted on this occasion (8, 10, 12, 13). This method of coupling the cars was safe enough to pull the cars around in the yard where they were at the time the coupling parted (10).

The question in this case which should have been controlling in the court below, and which we submit is the principal question at issue here, is the contributory negligence of the plaintiff's intestate. His negligence being the proximate and direct cause of the accident, was it of such a character as made it obligatory upon the court to direct the jury to return a verdict for the defendant, or was his conduct, while negligent, the result of a reasonable reliance upon the safety of a situation created by the defendants or on their manner of conducting their business at the place of the accident, which would, as matter of law, relieve him from a strict accountability for what would otherwise be considered in law gross negligence amounting to recklessness?

The gates at the crossing were down and completely shut off the railroad tracks from the traveled way. When down they were a warning; when up, as some courts have held, an intimation that the tracks were clear. Being down, they indicated that danger must be expected on each and every track of the crossing which they enclosed. At the time Landrigan went under the gates, passenger train No. 78 was approaching from the west; a shifting engine and crew were operating in the railroad yards immediately to the east, taking cars out of one track and putting them in an-

other, shunting and shifting them backward and forward. The engine to which these cars were to be attached was waiting on the track opposite the point on the crossing where Landrigan went under the gates. The time was a little before midnight, when the railroad men engaged in their necessary operations at that point, and knowing that the gates barring the crossing were closed, were not expecting pedestrians to be upon any of the tracks at the crossing. Landrigan, an old and experienced railroad man, who had crossed at this point at least four times each day and night for many years, well knew the peril of the situation, but disregarded it. He crossed an open space of from fifteen to twenty feet to get from the gate to the nearest rail of the track. If he had paused on this space or glanced to the east while crossing it, he would have seen the runaway car approaching. Familiarity with such dangers had bred in him a contempt for them; the gates sounded no note of warning which he was called upon to heed; the tracks conveyed no idea of probable harm, and the moving engines and cars all about him possessed no terrors, for he was accustomed to such surroundings. He boldly went under the closed gates, stood upon a track which was then in use, and was run over.

It must be admitted that the tracks of the railroad company at this point were subject to use by the company at all hours of the day and night, and that the "lead" or "ladder" track throughout its entire length was subject to use for shifting purposes at all times. If, in furtherance of the company's business, the shifting crew having the "Lylete" in charge had intentionally backed that car down the ladder track and across the southwest crossing, and, as the result of such action, Landrigan, who had come under the closed safety gates and attempted to cross the tracks, had been struck and killed, could it be reasonably contended that his administratrix should recover damages for his death? If

not, how is her right of recovery strengthened by the fact that in the ordinary course of defendant's business a car or train is unintentionally moved over a guarded track or crossing where it was lawful and right to move it intentionally?

It must also be admitted that, if plaintiff's intestate was injured by the express train No. 78, she could not recover; and yet, there being no testimony as to how the accident really happened save only deceased's own statement that he "came under the gates, and something struck me and A WHOLE STRING OF CARS RAN OVER ME," the jury was permitted to infer that deceased was run over by a single car rather than A WHOLE STRING OF CARS.

The plaintiff attempted to excuse her intestate's recklessness by saying that the gates were not a warning when lowered, because they were customarily kept down after about 11 o'clock at night; that the ladder track was not dangerous to stand on, because it was not regularly used; that her intestate was not obliged to keep a lookout for runaway cars, and was only bound to notice the movement of such cars and engines as he knew would likely pass there. To merely state the contention of the plaintiff is to show its fallacy as a proposition of law; to sum up the evidence adduced in support of it, we think will show its lack of foundation in fact.

Webster, who had been in the habit of crossing the tracks at the southwest crossing on an average of about twice a week, testified that *as a rule* the gates were down at night after the ordinary bedtime, but he could not say they were down all the time (16); that going north at 11 or 12 o'clock at night he had found the gates down and a car, shifting engine, or train moving in the vicinity of the crossing, and he sometimes crossed there and found the gates down and no train, car, or engine in the vicinity; that he had found the gates down and seen no trains moving in the vicinity

oftener than he had found the gates down when cars and trains were moving in the vicinity, but that when the gates were down trains might have been approaching the crossing and he not have seen them (18).

Story testified that he had been traveling over this crossing in the day and night time for fifteen or twenty years and would pass there sometimes as often as six or seven times in one night; that during this period he had passed there at night and called the watchman several times to get the gates up. The gates were mostly down all the time when trains were passing; that when he would be going home somewhere between 12 and 4 o'clock in the morning sometimes the gates would be down and he would have to call the gateman to get past (20); that he usually crossed there in a carriage, and the most trouble he had at night with the gates occurred after 12 o'clock; sometimes they would put the gates down and maybe go to sleep or something like that, and he would have to halloa to get the gates up; that he could clearly say this had happened about a dozen times. He had frequently come to these gates at night, both before and after 12 o'clock, when no trains were passing, and found the gates up, and crossed without any trouble, and he had done this very much more frequently than he had been stopped by the gates being down (20). He had frequently come there after 12 o'clock and found the gates up, and had found them that way very often (21). In response to a question by his own counsel as to whether in passing at night he found the gates more often down or more often up, he replied, "Well, I found them up, you know, but on a few occasions I found them down—twelve or fifteen times, I recollect"—that is, twelve or fifteen times in the ten years that he had been crossing there (21).

Kappel, the brother of the plaintiff, testified that the gates *as a general rule* were kept down at night after 11

o'clock (22), but he did not attempt to say that this was the invariable rule.

Martin, who had passed over the crossing once or twice a week, said he found the gates down at night (25); he thought it was the custom to keep them down; he thought it was a safeguard; he would call the watchman to raise them (26); that if there was any doubt as to whether a train was approaching, the watchman on the north side would call to the watchman on the south side of the crossing to ascertain whether a train was approaching (26); that he regarded these precautions of keeping the gates down at that time of night and of calling to the watchman on the other side to know whether a train was coming or the track was clear as a safeguard and proper thing to do (26).

Wilkinson said he *usually* found the gates down at night *after half past six or seven o'clock* (27), and when he returned, between 10 and 12 o'clock, he would *generally* find the gates down. Oeser said he never saw the gates up after bedtime, except when somebody asked to have them raised (28). Tripp, who lived opposite the crossing, testified that after the usual bedtime the gates were *mostly* kept down; that they would be up at times, but always down when trains were passing (30).

Does this evidence disclose an invariable and uniform custom to keep the gates at this crossing down after ordinary bedtime at night, such as would have justified the plaintiff's intestate in relying upon it? A custom must be uniform, certain, and established. It cannot be changeable, variable, or unsettled.

"A custom or usage must be certain and uniform; otherwise it will not afford a safe guide for the conduct of parties relying on it."

27 Enc. of Law, 719, 720.

"Custom or usage may be relied upon to excuse the violation of a rule when the act involved is not negligent in itself. * * * But custom can in no case impart the quality of due care and prudence to an act which involves obvious peril, which is voluntarily and unnecessarily done, and which the law itself declares to be negligent."

Glover *vs.* Scotten, 82 Mich., 369.
Hickey *vs.* R. R., 14 Allen, 429 (Mass.).
Humphreys *vs.* Newport News Co., 33 W. Va., 135.
Bryant *vs.* Cent. Vt. R. R. Co., 56 Vt., 710.

The contention of the plaintiff that her intestate's conduct in standing upon or near the ladder track was not negligent in law is equally untenable. Motley testified that this track was used more or less frequently in shifting operations, from one end of it to the other; that on that night they had been using it in their shifting operations from 7 to 7.30 o'clock; that in these shifting operations they would go all the way down to South Capitol street, if necessary, but that he did not remember going all the way down there on the night of the accident. On other nights they had been in the habit of going all the way and crossing South Capitol street when engaged in shifting; that cars were put on this track west of South Capitol street to be unloaded or just to get rid of them for a short while sometimes; that they would put them there to have them where they could get hold of the cars handy, and would also put them there temporarily during shifting operations (9).

Willhoit said that the ladder track was used all the time on week days, especially, and very frequently on Sundays, for putting cars in and pulling them out (15). Webster testified that he had never seen any shifting or making up of trains on the ladder track west of the southwest crossing, but admitted that he had seen cars shifted in there, and that it would be necessary to pull them over this crossing to get them out (17). This witness also stated that the use of this

crossing by engines and cars was almost continuous day and night (19). The plaintiff and her brother, Kappel, testified that the rails of this ladder track near the southwest crossing were rusty (23, 31). Their witness, Wilkinson, however, never noticed anything unusual in the appearance of the rails of this track—to him "all of the rails looked pretty generally alike" (27). Oeser testified that this track was always filled with coal cars, and Kappel said that he had seen cars on the west end of the ladder track hundreds of times, and knew that they were put in there and pulled out (24). As this track only had an outlet to the east (24), all cars put in and taken out of the west end of it necessarily had to pass over the southwest crossing.

Nor was Landrigan justified in assuming, if he did assume, that a car might not be shoved or shunted down this track at the time he attempted to cross or stand upon it. He could readily have seen and undoubtedly knew that the shifting crew was operating in the yard to the east of him. He knew that this ladder track connected with all the switches in the yard (8), and that there was danger of a car getting beyond the control of the shifting crew and running down this track to the crossing near which he stood. Oeser testified that he had seen cars go through there several times; that "sometimes when cars were coupled all right they would come down on you;" that he had known cars to be smashed up there once or twice by going all the way over this crossing (28). This testimony of itself shows the dangerous character of the track. The fact that one end of it was used for shifting purposes, and that it ran down grade towards this crossing, made it dangerous throughout its whole length.

Upon the whole evidence, it is submitted a verdict should have been directed for the defendant companies, and the court erred in refusing to do so.

II AND III.

The court also erred in granting certain prayers of the plaintiff which were given to the jury, and in the refusal of certain instructions asked by the defendants.

The foundation of the second and third assignments of error is the granting of the plaintiff's second prayer (32), and the refusal of the first, second, and third (34), sixth (35), and eleventh (35) prayers of the defendants upon the subject of the legal effect of the gates.

The plaintiff's second prayer, which was granted by the court, is as follows:

"2. The jury are instructed that if they believe from the evidence that the gates at the crossing where the deceased received his injury were generally kept down at night from 10.30 or 11 o'clock until the early morning, without regard to the approach or presence of a car, a train, or trains or locomotives, and shall further conclude from all the facts and circumstances of the case that the deceased had knowledge of that fact, then the circumstance that the gates at the intersection of South Capitol street were down at the time of the accident was not of itself a warning to him of the presence of danger, and contributory negligence cannot be imputed to him from that fact alone" (32, 38).

The defendants' first, second, third, sixth, and eleventh prayers, which the court refused, were as follows:

"1. If the jury shall find from the evidence that at the time the plaintiff's intestate approached the crossing in question the safety gates were closed or lowered and that said intestate went under said gates and stood upon or near enough to the south or 'ladder' track at or near the said crossing to be struck by a passing car and that while so standing upon or near said track he was struck by a car moving upon said track and received the injuries which resulted in his death, then the plaintiff's intestate was guilty

of contributory negligence and the verdict must be for the defendant" (33).

"2. If the jury shall find from the evidence that at the time the plaintiff's intestate approached the crossing in question the safety gates were closed or lowered, then they are instructed that the gates so closed or lowered were a warning to all persons approaching said crossing that cars, engines or trains might be expected to pass over and upon all or any of the railroad tracks at said crossing while the gates remained so closed or lowered, and if the jury shall further find from the evidence that the plaintiff's intestate did not heed such warning but went under the closed gates and was struck by a car moving upon one of the defendants' tracks at said crossing and thereby received the injuries which resulted in his death, the plaintiff cannot recover in this action and the verdict must be for the defendant" (33).

"3. If the jury shall find from the evidence that at the crossing in question and on the occasion complained of the defendant maintained four (4) tracks, the most northerly of which was used for the passage of freight trains and for shifting purposes, the most southerly, commonly called the 'ladder' track, being used for shifting trains and storage purposes, and the two intermediate tracks for the general business of the company, and that the defendants also maintained at said crossing safety gates operated by a gateman and at the time the plaintiff's intestate approached said crossing on the night of the accident these gates were closed or lowered and a freight or mixed train, with an engine attached, was standing upon the most northerly track on said crossing, and a shifting engine with a train of cars was operating upon said southerly or 'ladder' track in the railroad yards immediately east of said crossing and a regular express train was about due at said crossing, then the jury is instructed that said gates were closed or lowered for all trains, cars, or engines which were moving or passing or which might move or pass upon all or any of said tracks at said crossing and were a warning of danger which the plaintiff's intestate was bound to heed, and if the jury shall find that the plaintiff's intestate met his death by going under said gates and upon or so near to one of said tracks as to be struck by a car moving on said track, he was guilty of negligence contributing to the accident, and the plaintiff cannot recover in this action" (33).

"6. The jury are instructed that no evidence has been submitted in this case upon which they would be justified in finding the existence of any usage or custom to keep the crossing gates at the crossing in question lowered from 10.30 or 11 o'clock in the evening until an early hour in the morning irrespective of the passage of trains, cars, or engines" (35).

"11. It appearing from the uncontradicted evidence in the case that the defendants maintained at all hours of the night a gateman in charge of the gates at the crossing in question who raised and lowered said gates as occasion might require, and it further appearing from such evidence that such gateman was accustomed to open or raise said gates for the passage of pedestrians or vehicles when it was safe to do so, and it further appearing that the crossing in question being adjacent to the shifting, storage and engine yards of said defendants and between such yards and their passenger and freight stations in the city of Washington and that the main tracks leading to and from said station also passed over the same, said crossing was an especially dangerous place, the jury are instructed that in the absence of any evidence tending to show that the plaintiff's intestate, upon approaching said crossing and finding the gates between him and the tracks lowered or closed, made any request of the gateman to raise or open the same or submitted any inquiry as to whether any engines, cars or trains were approaching said crossing before he went under said gates and entered upon the crossing within the same and thereby received the injuries which resulted in his death, said intestate was guilty of negligence directly contributing to his own misfortune and the plaintiff cannot recover" (35).

In view of the decision of the Court of Appeals in the case of Cullen *vs.* The Railroad, *supra,* and of the decisions of the courts of last resort hereinafter cited, the granting of the second prayer of the plaintiff and the refusal of the five prayers requested by the defendants relating to the gates constituted reversible error.

The decisions of the courts are unanimous in holding that it is negligence in law to go under closed safety gates at a railroad crossing.

In an action against a railway company for injuries received at a grade crossing, where it appeared that plaintiff's intestate attempted to cross the tracks at night after the gates had been lowered, it was held that intestate's contributory negligence barred recovery by his personal representatives, as railroads from the necessity of the case have the right to the exclusive use of grade crossings when their trains are passing, and it is their duty to give suitable warning of such passing trains to travelers upon the highway. If they do this and the traveler disregards the warning, and without sufficient excuse insists upon crossing, he does so at his own risk. The court also said:

"In this case the intestate was warned by the lowered gates that it was dangerous for him to cross the track, and it was his duty to wait until the gates were raised; he voluntarily entered upon the track notwithstanding the warning and without excuse. This negligence on his part caused the accident, and the consequences of his rashness cannot be visited upon the defendant. *It is no answer to say that he may have supposed that the gates were down because a particular freight train was passing*, and he was willing to take the risk from that. He had no right to suppose so. It was negligence for him to enter upon the track when he was warned that the railroad required the exclusive use thereof."

Granger *vs.* Boston & Albany R. R. Co. (Morton, C. J.), 146 Mass., 276.

See also Allerton *vs.* R. R. Co., 146 Mass., 241.

Where a train was waiting on a certain track, and a man intending to become a passenger thereon disregarded closed safety gates, and while crossing an intermediate track was injured by another train running at dusk without a headlight, it was held that his contributory negligence barred his recovery, and a nonsuit granted on the trial was affirmed on appeal.

Debbins *vs.* R. R. Co., 154 Mass., 402.

Where a child of eleven years attempted to cross several railroad tracks at a street crossing where safety gates were closed and was killed in the attempt; her personal representatives seeking to recover for her death, were nonsuited on the trial, and this action of the trial court was affirmed by the appellate court on appeal, the court holding that a railway company has the right to the exclusive use of a crossing when its trains are passing thereon, and if it gives a warning of such use which the traveler disregards he does so at his own risk. Lowered gates over a crossing are a sufficient warning, and if they enclose several tracks no one has a right to suppose that they are lowered merely because of a switching engine then in sight. In the case at bar the child being familiar with the crossing and using it several times a day, the only proper inference is that she understood and took the risk.

Marden *vs.* Boston & Albany R. R. Co., 159 Mass., 393.

Persons who disregard the warning of safety gates when the same are being lowered and receive injury thereby are guilty of contributory negligence barring their recovery.

Peck *vs.* R. R. Co., 50 Conn., 379.

If a driver approaching a crossing is warned by a flagman to stop, and in disregard of such warning he goes forward and is injured, he is barred from recovery by contributory negligence.

B. & O. *vs.* Colvin, 118 Pa. St., 230.

Where safety gates which covered the driveway of a street, but not the footway, were down, and a pedestrian, familiar with the crossing, attempted to cross and was killed by a train backing, which gave no signal, and the view of which was impeded by other cars, a nonsuit was entered by the trial court for contributory negligence in disregarding the

lowering of gates over the driveway. On appeal this action of the court was affirmed, it being held that the gates were a warning to foot passengers as well as to vehicles, and *when they were down they were down for all trains moving or passing at the time and not on account of a particular train.*

Cleary *vs.* R. R. Co., 140 Pa. St., 19.

Safety gates at a railroad crossing over a city street are a warning of the passing of trains, not only to vehicles, but also to pedestrians, and if in disregard thereof a pedestrian passes a closed gate in broad day, enters upon a crossing, and while watching one train is struck by another, his contributory negligence will prevent a recovery. "In the case at bar a train was approaching, the gates were down as they should be, and the plaintiff was thereby warned of danger. *It was a matter of no moment whether the gates were always down or not.* In this particular instance the gate was down and the defendant discharged its duty in that regard. If the plaintiff had performed his duty he would not have been injured."

Sheehan *vs.* R. R. Co., 166 Pa. St., 354.

A pedestrian came to a crossing as the safety gates were being lowered thereon and an approaching train was in sight. He ran under the gates and crossed the track in safety before the train and turned to watch its passage. While so engaged he was killed by another train suddenly coming around a curve. On the trial a verdict for the defendant company was directed by the court because of contributory negligence in the plaintiff's intestate, and this direction was affirmed on appeal.

Duvall *vs.* Mich. Cent. R. R. Co., 105 Mich., 386.

Where a man familiar with the place attempted to cross at night tracks when safety gates were closed, and while avoiding one train was struck by another backing up without a

light or man on its approaching end to give warning, and although many persons customarily made similar crossings when these gates were down, plaintiff was nonsuited at the trial for contributory negligence, which action was affirmed on appeal, the appellate court holding that where safety gates are maintained at city crossings it is the duty of travelers, observing that the gates are down or about to be let down, to stop until they are raised before proceeding. The presence of the gate across the street says to the traveler in a manner not to be misunderstood that such tracks are to be presently used for the passage of trains. The track itself is a general notice of danger calling upon the traveler to look and listen for approaching trains; but the presence of the gate across the highway is more. It is a specific notice that the danger of going upon the track is immediate, and that no person of ordinary care should assume it without expecting to take all the risks upon himself. It is no excuse for disregarding such warning that persons were accustomed to cross at that place when the safety gates are down, for the doing of an act so obviously dangerous constitutes negligence as a matter of law, regardless of custom.

Douglass *vs.* R. R., 100 Wis., 405; 76 N. W. 356 (1898).

See also—

Lake Shore and Michigan R. R. *vs.* Ehlert, 19 A. and E. R. R. Cases (N. S.), 731 (Ohio S. C.).

Buckley *vs.* R. R. Co., 15 A. and E. R. R. Cases (N. S.), 1 and note (Mich. S. C.).

IV AND V.

The fourth and fifth assignments of error embrace the defendants' exceptions to the granting of the third (32), fifth (33), and sixth (40) prayers of the plaintiff. All of these prayers related to the degree of care to be exercised in crossing the tracks at the crossing in question, including the ladder track.

Said prayers are as follows:

"3. While knowledge by the deceased of the presence of the Fenton engine on the north track upon or partly upon the South Capitol Street crossing and the approach of No. 78 upon one of the central tracks at or near the time of the accident might or would indicate the presence of danger on or near those tracks, it is for the jury to determine upon all the facts of this case whether it was a want of ordinary or reasonable care and prudence upon his part to be upon the south track, at the point upon said last-named track at which they shall find from the evidence the accident occurred" (32).

"5. The burden of proving that the accident to the plaintiff's intestate occurred through his contributory negligence is upon the defendant. But it may rely upon any evidence introduced by the plaintiff tending to show such contributory negligence, if any there be. But in order to justify the jury in finding contributory negligence, all the evidence tending to establish it should be weightier in their minds than all tending to negative it" (33).

"6. That in considering and determining the question of alleged contributory negligence of deceased, the character of the track upon which deceased was (if the jury shall find that he was upon one of the tracks of defendant, and was so at the time he was hurt), the purpose for which said track was used, the extent of its use and all the facts and circumstances surrounding the injury that caused deceased's death, should be taken into consideration in deciding whether or not deceased was guilty of contributory negligence or not" (33).

It will not be necessary to further discuss the evidence bearing upon the use of the "ladder" track. This evidence, we think, conclusively shows that this track was used almost constantly, and the irregular character of its use made it more dangerous than any of the other tracks at the crossing. The Supreme Court of the United States has held time and again that a railroad track is always to be regarded as a place of danger, and that the track itself is a warning of danger. That court has also held that "it can never be assumed that cars are not approaching on a track or that there is no danger therefrom."

Elliott *vs.* Chicago, etc., R. R. Co., 150 U. S., 245, 248.

The court below granted the defendants' seventh prayer (40), which told the jury, substantially, that there was no evidence from which they would be justified in finding that the "ladder" track was an unused track, and that the plaintiff's intestate was bound to exercise due care and caution before attempting to cross it. The court, however, negatived this instruction by granting the plaintiff's third prayer (39), which left it to the jury to say whether or not it was a want of ordinary care and prudence on the part of Landrigan to be upon the "ladder" track at the point where and at the time when the accident occurred. The two instructions were plainly contradictory, and could have no other effect than to confuse the jury.

VI.

The defendants' sixth assignment of error is based upon the refusal by the court of the defendants' fifth prayer (34, 35) and the giving of the court's substitute for the plaintiff's first and sixth prayers (32, 39).

The defendants' fifth prayer was as follows:

"5. The jury are further instructed that there is no presumption of law that the plaintiff's intestate did so look

and listen before going upon or dangerously near to the tracks at the crossing and on the occasion in question, but on the contrary the law requires that this precaution on the part of the plaintiff's intestate shall be fully established to the satisfaction of the jury by a fair preponderance of the evidence in the case, and the jury are instructed that there is no evidence in the case from which they can find that said intestate did so look and listen" (34, 35).

The court's substitute for the plaintiff's first and sixth prayers was as follows:

"In the absence of all evidence tending to show whether the plaintiff's intestate stopped and looked and listened before attempting to cross the said south track, the presumption would be that he did. But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances proved in this case do rebut that presumption, and if they find they do they should find that he did not so stop and look and listen, but if the facts and circumstances fail to rebut such presumption, then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did not, all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary" (32, 39).

The evidence having failed to show that the plaintiff's intestate looked and listened before attempting to go upon the ladder track, the court told the jury that the presumption of law would be that he did stop, look, and listen. We think this was manifestly erroneous. Landrigan was bound to look and listen, and the fact that he was injured by this car, although he could have seen it if he had used his senses, proves that he did not look. As was said by the Supreme Court of the United States in a very recent case, "Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look, or if he did look he did not heed the warning and took the chance of crossing the track before the

train could reach him. In either case he was guilty of contributory negligence."

Northern Pacific R. R. Co. *vs.* Freeman, 174 U. S., 384.

"When to look is to see, the simple utterance that one did look and could not see will be disregarded as testimony by the court."

Hook *vs.* Mo. Pac. R'y Co., 63 S. W. R., 360.
21 A. & E. R. R. Cas. (N. S.), 787.

We submit that the true rule in cases of this character is that there is no presumption of law against or in favor of either plaintiff or defendant: there is no presumption of negligence, nor is there any presumption of the exercise of due care, on the part of either party. In this jurisdiction, the burden of proving the negligence of the defendant is upon the plaintiff; the burden of establishing the contributory negligence of the plaintiff rests with the defendant unless it appears from the evidence given by the plaintiff (15 Wall., 401).

For discussion of this subject see—

7 A. & E. Enc. of Law, pp. 439, 440.
12 A. & E. R. R. Cas. (N. S.), notes at pages 416, 417.

In the case at bar, where the only evidence—the nature of the accident, the physical surroundings at the place where it happened, and the deceased's own statement of how it occurred—showed that he did not look for the approaching car, whatever slight presumption there may have been in his favor that he exercised due care was overborne, and it was grave error in the trial justice to instruct the jury as he did in giving the substituted prayer set forth above.

"If a traveler by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did

look, that he did not heed what he saw. Such conduct is held negligence *per se.*"

Beach on Contributory Negligence, sec. 182.

"The law will not presume that a plaintiff has been negligent, in the absence of some evidence tending to show it; but when his evidence tends to create the presumption, then he must rebut the presumption by sufficient proof to produce a belief in the minds of the jury that negligence on his part did not in fact exist."

Mo. Pac. R. R. Co. *vs.* Foreman, 73 Tex., 311.

In many jurisdictions, like Maryland, where it is held that, in the absence of all evidence, it will be presumed that the decedent exercised reasonable care, it is said to be error to give an instruction like that here complained of, where there is any evidence from which it might be inferred that such care had not in fact been exercised.

In the case of Philadelphia, Wilmington and Baltimore R. R. Co. *vs.* Stebbing, 62 Md., 504, the court of appeals of Maryland held that it was error in that case to instruct the jury that they might "infer the absence of fault on the part of the plaintiff from the general and known disposition of men to take care of themselves, and keep out of the way of difficulty and danger."

In passing upon this instruction, Chief Justice Alvey said:

"With respect to the fourth prayer of the plaintiff, which was granted, in view of the facts of the case, we think it ought to have been refused, or if granted at all, it ought to have been in a modified form, to avoid the possibility of misleading the jury. It is certainly true, the motive to self-preservation is a principle of our common nature, and it is but rational to presume, in the absence of evidence to the contrary, that parties act under its promptings in view of impending danger. But, in such cases as the present, there is a counter-presumption, when the proof does not show to the contrary, and that is, that every person charged with a duty involving the safety of himself or others, will perform

that duty; so that in fact it is not often the case that these mere presumptions afford much assistance in arriving at correct or just conclusions. They ought not to be indulged to the exclusion of direct evidence to the contrary; and it is only where there is no reliable proof to the contrary, or there is rational doubt upon the evidence as to the acts or conduct of the parties, that such presumptions can properly be invoked. The jury ought not to be instructed in such terms as would justify them in acting upon the mere presumption of the absence of fault in either party, in disregard of the proof in the case, where there are facts and circumstances to be considered by them. The form of the instruction in this case is the same as that used in several cases that have come before this court, and where the instruction has been sanctioned; but the propriety of such instruction must always be determined with reference to the nature and state of the proof before the jury. It will not do to instruct them that it is competent for them, in connection with the facts and circumstances of the case, irrespective of the nature and force of such facts and circumstances, to infer the absence of fault on the part of either plaintiff or defendant, *from the known general disposition of men to avoid danger.* Such an instruction in many cases would be exceedingly misleading; and, we think, it was error to give it in this case in the form in which it was given."

It is submitted that the judgment of the court below should be reversed.

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Court of Appeals, District of Columbia.

APRIL TERM, 1902.

No. 1168.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY AND THE PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY, APPELLANTS,

v.

CATHARINE LANDRIGAN, ADMINISTRATRIX OF THE ESTATE OF THOMAS J. LANDRIGAN, DECEASED, APPELLEE.

J. J. DARLINGTON.
CHAS. A. DOUGLAS.
JOS. D. WRIGHT.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 2689

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v.

CATHARINE LANDRIGAN, ADMINISTRATRIX OF THE ESTATE OF THOMAS J. LANDRIGAN, DECEASED, APPELLEE.

STATEMENT OF FACTS.

This is an action by the plaintiff, Catharine Landrigan, as the administratrix of the estate of her deceased husband, Thomas J. Landrigan, to recover damages of the defendants for the negligent killing of the said Thomas J. Landrigan, deceased, at the intersection of the defendants' railroad tracks on Virginia avenue with South Capitol street, in the city of Washington, about 12 o'clock on the morning of the 29th of August, 1898. The deceased was a machinist, employed on the night force in the defendants' "round-house" on South Capitol street, south of the crossing on Virginia avenue (Rec., p. 8). Deceased was allowed an hour—from 12 to 1 o'clock—every night (Rec., p. 21), and was in the habit

of going home to his lunch at this hour (Rec., p. 31). Landrigan's house was No. 33 Virginia avenue S. W., and in going to his lunch he was accustomed to cross the railroad tracks at the intersection with South Capitol street.

On the night of the accident the deceased left the "roundhouse" as usual and proceeded along South Capitol street until he arrived at the crossing of the railroad tracks at Virginia avenue, where he was knocked down and run over and killed while attempting to cross said tracks. South Capitol street is divided at its crossing on Virginia avenue by a parking or reservation in the center of it about 50 or 60 feet wide, thus making two crossings, a southeast and a southwest crossing (Rec., pp. 10, 16). These crossings are situated in what is called the "Jersey yards" (Rec., p. 18), which extend from South Capitol street east to New Jersey avenue. The defendants maintain at this place four tracks along Virginia avenue, running east and west, the north track being used for shifting purposes, the central two being the main tracks leading to and from Washington and Philadelphia, and the south track being used as a "lead" or "ladder" track—that is, all the other tracks in the yard lead into it, and the eastern end of it only is used for making up trains (Rec., pp. 6, 8, 14). This "ladder" track runs from F street S. W. across South Capitol street to I street S. E. (Rec., p. 6), and extends west of the crossing to an alley (Rec., p. 8), runs from one end of the yard to the other (Rec., p. 14), and stops at the end of the property yard (Rec., p. 16), about 200 feet beyond the southwest crossing (Rec., p. 17), and is called a "blind" (Rec., p. 16) and a "dead" track because it does not lead anywhere (Rec., p. 17) and only has an outlet to the east (Rec., p. 24). The west end of the "ladder" track (*i. e.*, west of the southeast crossing) was used for storing freight cars, but not passenger coaches (Rec., p. 8), to put in coal, railroad ties, iron, etc., for the use of the company, and no portion of this track lying west of the southeast crossing was used for shifting or

making up trains (Rec., pp. 17, 23). This "ladder" track runs downgrade from east to west on South Capitol street (Rec., p. 6).

The defendants maintained at both of these crossings guard or safety gates (Rec., pp. 14, 16). At the southwest crossing, which is the one where Landrigan was killed, the distance from the gates to the southernmost rail of the south or "ladder" track was estimated by different witnesses to be from 10 to 15 feet (Rec., pp. 16, 22). In the month of August, 1898, and prior thereto, these gates at the southwest crossing were always kept down or closed after the usual or ordinary bed-time, 10 or 11 o'clock at night, and this was the regular condition of the gates whether a train was passing or not (Rec., pp. 16, 17, 25, 27, 28, 29, 30).

Although the defendants kept a watchman or gateman stationed there in charge of the gates, it was necessary to ask him to hoist the gates (Rec., pp. 27, 30), and sometimes to wake him up (Rec., pp. 27, 28) in order to pass, and after bed-time the said gates were only up when some one asked to have them raised (Rec., p. 28).

At the time of the accident which caused the death of the deceased a train of tourist or passenger cars to go South was being made up in the "Jersey yards" and a train of eight or nine cars had been pulled out on the "ladder" track (Rec., pp. 6, 14). At a point leading into a switch on a little curve east of the crossings a Pullman coach, which had been taken from one of the storage tracks and which was the rear car of the train of eight or nine above mentioned, broke away from the cars to which it was attached and ran back westward along the said "ladder" track, which, at this place, was an "ordinary downgrade" (Rec., p. 6), across the southwest crossing a little over a hundred yards, and was stopped by striking some cars loaded with sand and coal (Rec., pp. 8, 14). This is the car which struck the deceased at the said southwest crossing, and he was found lying on the ground near to and south of the southernmost rail of the "ladder"

track, immediately after it passed the said crossing (Rec., pp. 8, 10, 12, 14). The testimony does not show how he was killed, whether he was standing on the ladder track or in the space between this track and the gate or in the act of walking across the track when he was struck.

The only light on this car was a light either in the little dome-shaped vestibule in the top of the car or inside the coach. There was none at all on the platform of the car (Rec., pp. 8, 14, 15).

The plaintiff charges in her declaration that the breaking away of the Pullman car from the train of cars was caused by the negligent and careless manner in which it was coupled to the coach immediately in front of it; that the inability of the employees of the defendant company to stop the coach resulted from the defective condition of the brakes on both of its ends; that defendant failed and neglected to have proper lights on said coach or to give proper signals of its approach, and that the injury to the intestate, resulting in death, was caused by these acts of negligence. In the argument, the testimony on which the plaintiff relied in the trial court is fully set out, and need not therefore be incorporated in detail in the statement of facts.

At the close of the plaintiff's case the defendants moved the court to instruct the jury to return a verdict in their favor, which motion the court overruled (Rec., p. 32). The appellants, electing to submit the case to the jury on the plaintiff's evidence, refused to offer any testimony on their part, and again requested the court by their fifth, sixth, and eleventh prayers to instruct the jury to find for the defendants (Rec., pp. 34, 35). These prayers having been rejected, a verdict was rendered for the plaintiff, and from the judgment entered thereon this writ of error was sued out to this court.

And it is from these rulings of the court below that the question on this appeal arises.

ARGUMENT.

The question presented is, what was the proximate cause of the death of plaintiff's intestate—was it (1) the negligence of the defendants or (2) the contributory negligence of the deceased?

The issue was raised by motion to instruct the jury to return a verdict for the defendants, and by sundry prayers, which were the equivalent of such a motion.

The controversy here is one principally of fact—there is, or rather should be, but little difference between counsel about the law.

The sufficiency of the evidence is not the issue. That question is peculiarly one for the jury. We are not before the jury in the first instance or the trial court for a new trial, in the second.

The trial judge was asked to instruct the jury to find for the defendants. Before this could have been properly done, it must have been made to appear either that there was no evidence of the defendants' negligence, or such clear and convincing evidence of contributory negligence of the deceased that no reasonable men could fairly differ about it. In the case of Douglas *v.* The Chicago, Milwaukee & St. Paul Railroad Co., 100 Wis., 407 (a case relied upon and quoted by appellants), the tests of the respective functions of judge and jury are thus stated in the opinion of the court:

"Where there is a reasonable dispute as to the evidentiary facts tending to establish negligence, or to the reasonable inferences, which a jury might draw therefrom, the ultimate fact as to whether the party charged with negligence is guilty, is for the jury; but where the facts are undisputed, and the inferences therefrom *all one way*, the controversy turns upon the question of law that must be decided by the court."

The Supreme Court of the United States has clearly and strongly stated the rule in the following language:

"When a given state of facts is such that reasonable men may clearly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court." Grand Trunk Railroad Co. *v.* Ives, 144 U. S., 408.

The same tribunal in a later case quotes and endorses the above paragraph from the Ives case. Texas & Pacific R'w'y Co. *v.* Gentry, 163 U. S., 353–369.

This court, in the case of Cowen *v.* Merriman, 17 App. D. C., 186, sets out in the body of its opinion the test announced in the Ives case, and quoted approvingly in the Gentry case, and, applying that test to the facts in the Merriman case, says:

"In this case it may be well contended that the proof of contributory negligence on the part of the deceased is strong, and many reasonable minds might be decidedly inclined to conclude from it that the deceased was guilty of contributory negligence in causing the accident. But the state of proof is such, that we cannot say that *all reasonable men* would so conclude."

There is no discordant note in the cases in this jurisdiction on this subject, and further reference to them surely ought to be unnecessary. Applying the test (about which there ought to be no sort of question) to the facts of this case, it can be readily ascertained whether or not there was error on the part of the trial judge in refusing the motion to instruct.

I.

Defendants' Negligence.

In examining into and passing upon the testimony of the witnesses Motley and Willhoit, it is to be noted that both of them were, at the time they were examined, in the employ of defendants, and that they were unwilling witnesses against their employers.

The defendants are charged with three several acts of negligence, which, according to the contention of plaintiff, separately or in conjunction caused the death of Thomas J. Landrigan. They are: (1) Defective coupling or a careless and negligent coupling of the runaway car with the coach immediately in front of it; (2) defective and worthless brakes on both ends of the runaway car; (3) absence of a light and other danger signals. The testimony upon which the trial court passed in refusing defendants' motion is not only pertinent, but necessary in order to enable this court to determine if there was error below. We give a carefully prepared summary of the evidence on these points in the order stated above.

A—The Coupling.

Motley: Coupled the coach with the assistance of brakeman Willhoit and Hottal, the yardmaster. The car that broke away was a Pullman, and the car to which it had been coupled was a tourist car. The Pullman had a Janney coupler, and there was a Miller coupler on the tourist car. The Miller and Janney couplers would not couple. They were not made or intended to couple together. One was a little higher than the other, the Janney being the higher of the two, but don't remember whether or not one went over the other. One of the draw-heads was higher than the

other. It was a very difficult coupling to make, and a link and pin had to be used to couple the cars together. * * * He did not know whether the difference in height made them less or more difficult to couple. He coupled the two cars in question by putting a link in the Janney coupler and putting a pin through the hole in that coupler; *then laid the link on top of the Miller coupler*, and put a pin down through it. In both the Janney and Miller couplers there is a slot for a link and also a hole for the pin to go in. He did not put the link in the slot of the Miller because he could not get it in there. He could not explain why he did not do it that way. It was a difficult coupling to make either way. He did not remember whether they tried to do it that way or not—he coupled it the best way he could; the easiest way he could couple it—or whether the difference in the height of the two couplers had anything to do with causing him to put the link on top of the Miller coupler instead of placing it in the slot of the Miller * * * The pin held the link in position on top of the Miller coupler; the link could not very well go over the top of the pin which held it in place—leading over the switch, the two couplers rubbing together forced the pin up out the hole, so as to pry it up.

Kappel—DIRECT EXAMINATION: Train No. 78, from New York, was scheduled to leave the depot at 11.50 or 11.55 (Rec., p. 22) * * * The link was too short to put it in the slot of the Miller coupler, but the link was long enough to enable the pin to go down through the hole. Where the link is laid on top of the coupler instead of in the slot, he does not know what would be the effect upon the rear coach if a slack should take place by the cars coming together. The coupling which he made was a very ordinary coupling, and is made right along; possibly it might hold all right; he had never seen it break loose before; it was customary to couple cars by putting the link

on top instead of through the slot; this coupling was caused to break away by the slack running up between the cars when they jolted together—by the Janney and Miller couplers running up together; the rubbing together made the pin raise up and broke it loose—when coaches are properly coupled together they break loose very often in that way; when two cars are properly coupled with a link and a slack is produced, causing them to bump together, they come apart sometimes, although this is very rare, and it is also very rare that the other coupling comes apart. * * * He does not remember what became of the link or pin after the car broke away (Rec., pp. 6, 7). * * * The link and pin used in making the coupling were the ordinary link and pin (Rec., p. 8). Ladder track is an ordinary down grade from the point where the car broke away toward South Capitol street (Rec., p. 6).

CROSS-EXAMINATION: * * * That if they had not made a link-and-pin coupling they might have pulled the cars out with a big heavy chain; a chain is used sometimes when the draw-head is pulled all the way out; where there are two draw-heads, with a coupler in each draw-head, the ordinary way to couple them is to use a link and pin whenever the couplers are not alike (Rec., p. 10); followed runaway car down to crossing after he got rid of rest of cars; reached there about three minutes after the car passed over the crossing (Rec., p. 9).

REDIRECT EXAMINATION: Hottal, the yardmaster, was present when witness coupled the cars together; that witness told him that he could [not]? couple them up the way they were coupled, and Hottal said, "Couple them up some way, and get them out of here." At that time the crew was waiting for the car on the main track, and they were in a hurry to get it out; he was having some difficulty to get it coupled when he made this remark to Hottal. It is not true that the cars would not couple at all; they would not couple without using a link and pin. The coupling was safe

enough to pull the car out of the yard, and that was all that was wanted; it did not do it on that night because it broke loose; nothing extraordinary happened to make it break loose. * * * The couplings "slipped around," he supposed, when they were going around the curve, and that had a tendency to make them come apart; that he supposed it was due to the slack caused by coming over the switch on the ladder track; that the statement made by him at the former trial, that he "used a link, put a pin down through the Miller, just a temporary coupling to pull the car up this track, and put the link over the Miller, put the pin down in the Miller, and stuck a pin through the link, and the pin having a head on it held in that position—held the link in position to pull the car out—but when it got up on the curve the slack ran together, and probably the pin dropped down—the link jumped over or twisted off the head of the pin—that is as nearly as I can explain it to you about this coupling," was substantially correct. That after the car was coupled they pulled it probably 45 or 50 yards, and when it got on the curve formed by the ladder track and the track from which they were bringing it, it broke away; that he knew this curve was there (Rec., pp. 10, 11). * * * They could have used a chain on that night, but did not have any to use when they wanted to get the car out; there were chains in the yard; he does not know whether the chain would have been perfectly safe or not; the car might have broken away by the chain becoming untied or loose or breaking, unless it was very strong; that he did not remember examining the pin on the tourist car, but remembered looking at the pin in the Lylete, the Pullman car. This pin was still in the hole in the link, and this satisfied him that the link had pulled over the head of the other pin (Rec., p. 11).

RECROSS-EXAMINATION: The head of the pin would not go through the hole in the link and would hold it in position; that the draw-head was a big piece of iron fastened to

the end of the car, and the coupler was attached to the end of the draw-head. When the draw-head is completely pulled out the coupler comes with it. When two cars are in that condition they have to use a chain to keep them together. When the cars have a complete draw-head and coupling attached, no chain is necessary, and they simply used a link-and-pin coupling when the couplers are not alike. This was the way they did on that night. There was nothing the matter with the draw-heads. They were simply different couplers and would not couple (Rec., p. 11).

Willhoit: Hottal (the yardmaster), Motley, and himself made the coupling. One car had a Miller and the one that broke away had a Janney coupler. It is impossible to couple a Miller and Janney together. It was on a curve, and therefore they used a link and pin. It was a secure coupling to pull the car around in the yard, but it was not a safe coupling to run over the road. It was sufficient for the yard and was very frequently done. The couplings did not couple exactly, because they did not fit. You cannot couple two such couplings together, and have to use a link and pin. The Miller coupler is not as high as the Janney; it is a thinner piece of iron, and the drawhead is thinner than that of the Janney. The link was put in the Janney all secure, and then laid over the top of the Miller and a pin run through the top of the link and down through the hole in the Miller. There was a place in the Miller coupler for the link to go in, but it was a little lower, and it could not be put in there on account of that curve. They coupled the cars right on a curve. The curve swayed the car around and brought the Miller coupler out on the side like. When the pin was put down through the link and into the hole in the Miller coupler the head of the pin was on top of the link, and the only thing to keep the link from slipping over the head of the pin was the shoulder around the head of the pin; that he supposes it would have

been safer if they could have put the link through the regular place for that purpose in the Miller coupler (Rec., pp. 12, 13).

CROSS-EXAMINATION: He saw the coupling made, but did not make it himself. When they found cars with the old-fashioned drawhead, and wanted to couple them to a car with a Janney coupler, they used a link and pin, which was the usual coupling when they got cars of that kind; this was done very frequently, but it is not done so much now as formerly because they get more cars with the new equipment; that he did not say the Miller coupler was lower than the Janney, but that it was not as thick as the Janney, which made it apparently lower than the Janney when the cars came together; that they laid the link on top of the Miller because they could not get it into the groove; the top of the pin was holding it in place (Rec., pp. 14, 15).

B—THE BRAKES.

Motley: The men on the car, Hottal and Willhoit, did all they could to stop it; he saw these men putting the brake on at the end of the Pullman car next to him, but could not see what they did at the other end; he did not know whether they left the end next to him for the purpose of putting the brakes on the other end; the car ran a little over a hundred yards, probably, before it stopped; it was stopped by striking some cars down on the ladder track (Rec., pp. 7, 8). * * * He did not remember testifying at the former trial that they could not stop the car because of a "defect in the brake—the brake did not hold," but that it is true that the brake might have hung in some way; *the brake did not hold the car*, but he does not know what was the matter with it (Rec., p. 11).

Willhoit: When they were pulling the car out on the straight track he tried the brake and it appeared to be all

right, but when some one hollered that this car had broken off he went to work on it again; *it did not seem to catch hold;* he dropped off the end of the car and caught the rear end of it—the head end—and at the same time Hottal got on the end that he got off of, called for Wilber to help him to put the brake on, and they did all they could to stop the car, but the car had got too much start. The brake seemed to work all right; he did not have any fault to find with the brake, only the car had got too much start. He first tried the rear brake and could not get that to work; then went to the other one. While he and Wilber were working on the forward brake Hottal jumped on and tried to work the rear brake; *they did not succeed in stopping the car* because it had gotten too much of a start (Rec., p. 13). * * * The car was running slowly when he started to put on the brake; he jumped off, went to the other end, and when he got there the car was not running very fast. Hottal got on the rear end just as he got off; does not know whether or not he said at the coroner's inquest that "he did not think the brake was any good or else it would have stopped the car," nor could he say whether he testified at the inquest that the front brake was loose and was not doing any good. *The brake did not do any good* because the car had too much start. Wilber jumped off with him. You sometimes apply a brake and it does not "take up" right at first; could not say whether he noticed any slacking up of the car as a result of putting on the brakes, because he got off, and it was dark, night-time, and he could not see (Rec., p. 13). Followed the car down, practically kept with it, but was a little distance behind it (Rec., p. 14).

C—Lights and Signals.

Motley: "A white light in the vestibule of the Pullman in the little dome-shaped arrangement in the roof of the car—this was the only light hanging in the vestibule, and there was no light on the platform" (Rec., p. 8).

Cross-examination: "The lamp in the dome had a white shade or globe underneath—it gave a bright light—you could see it all right—the lamp was inside the door and the door was closed—the glass in the door extended about half way down, and the light shone through the glass in the door—the same sort of light was in both ends of the car" (Rec., p. 10).

Willhoit: "There was a light on both ends of the coach—there was a light in the coach, but none on the back platform" (Rec., p. 14).

Cross-examination: "Did not stop because, *by the light being in the car*, he thought perhaps there was a porter or somebody in there" (Rec., p. 15).

In other places in the testimony of this witness he testifies that the light was bright and could be seen on the ground, etc., but detailed reference to, and quotations from, it are given in another portion of this argument.

One thing is manifest: That both Motley and Willhoit place the light, in one portion of their testimony, in the roof of the car, protected by a shade or globe, and in another portion wholly within the car; but there is no pretense that there was a red or other signal light on the end or platform of the coach.

It is not claimed that any signals or warnings of any kind of the approach of the car were given.

II.

Alleged Contributory Negligence of Deceased.

Defendants charge that this contributory negligence which they would impute to deceased consists of two distinct acts on his part: (1) going under the closed gates; (2) failing to look and listen. Let them be disposed of in their order.

(1.) *Going under the closed gates.*

Appellants cite many authorities and quote *in extenso* from the opinions of the courts in support of the general proposition that to go under closed gates and on a railroad track constitutes negligence *per se.*

We have no quarrel to make, either with the decisions quoted and relied on or with counsel for citing them.

The principle as stated, and when applied to the ordinary case, where the gates are used as signals of danger or safety—danger when closed, and safety when opened—is obviously wholesome and sound.

If, therefore, the condition of the gates and their method of operation at the crossing where Landrigan was killed had been normal; if at the time of his death and immediately preceding and succeeding the 29th of August, 1898, the gates at this crossing were lowered when danger was present and imminent, and were raised when danger was absent and not immediate, this action would never have been instituted.

The facts of the case, however, are quite the contrary. Upon the testimony of the witnesses, eight in number, it was shown for the plaintiff, and it is an uncontradicted fact in the record, that at this crossing of South Capitol street it was the rule and custom of the defendants to close and lower the gates at ten or eleven o'clock at night, and to keep them

down throughout the hours of the night, until the early morning, raising and opening them only when vehicles were there and parties in charge of them asked that they be opened to enable them to cross.

While the testimony of the witnesses is not entirely in accord on the point as to whether the gates were *ever* up when no trains were in sight or approaching (five out of the eight testified that they had never seen them up between the hours named on a single occasion except when the gateman was asked to raise them), they are as one on the proposition that it was the *rule*, the *custom*, to keep them down from ten or eleven o'clock at night until morning.

Defendants offered no evidence in opposition to or in contradiction of the testimony offered by the plaintiff on this point.

If this case were being argued *now* before the jury, we submit, respectfully, that there is in the record sufficient testimony to establish the following propositions:

(1.) That the gates were kept down all the time between the hours of the night heretofore stated, and, without variation, were not raised, except when a vehicle was to pass and a request to raise the gates made. This proposition by a clear preponderance of the evidence.

(2.) That there was a custom, usage, or rule, definite and fixed, to keep the gates down between the hours named, whether trains were in, or out of, sight, with an exception now and then when the gates were up and no trains were passing or in sight. This proposition beyond a reasonable doubt.

(3.) That Landrigan, the deceased, had full knowledge of this custom or usage, and had many times before his death acted upon the faith of it. This proposition beyond a reasonable doubt.

But this court is not reviewing the action of the jury in deciding this issue with plaintiff. It is not to pass upon the question on which side is found the preponderance of the evidence. The question whether the jury properly exercised its peculiar function to weigh the evidence is likewise not, now and here, the subject of review.

The alleged error lies in the refusal of the trial judge to direct the jury to return a verdict for the defendants—in other words, whether "*the state of proof* [*in favor of the defendants*] *is such that * * * all reasonable men would so conclude.*"

So great is the weight of the evidence in plaintiff's favor that it *cannot be said* for defendants' contention here, as was said by this court in the Merriman case, "that the proof of contributory negligence on the part of the deceased is strong, and many reasonable minds might be decidedly inclined to conclude from it that the deceased was guilty of contributory negligence in causing the accident."

To summarize—plaintiff's contentions are:

a. That the gates at the crossing, prior, at, and subsequent to Landrigan's death, were uniformly, or at least customarily, lowered at or about ten o'clock at night, and were kept down throughout the night, until the early morning, and were raised only when necessary to allow the passage of vehicles.

b. That deceased knew of this usage or custom, and had many times acted on the faith of it.

c. That the legal effect of this rule of operation of these gates takes the case of Landrigan out of the general rule that it would be negligence *per se* to go under the closed gates.

The evidence upon which plaintiff relies to establish each of these propositions of fact has been collected from the

record and is here succinctly set out under its appropriate head.

A—Condition of the Gates.

Webster: The gates at the southwest crossing of South Capitol street in the month of August, 1898, and prior thereto, whether trains were passing or not, were generally kept down—that was, as a rule. Of course, he could not say they were down all the time, but as a rule they were down after ordinary bedtime; for a number of years had occasion to cross the tracks back and forth both day and night, because business required him to go down there. He had gone along there at 11 or 12 o'clock at night and at all hours of the night, and it was his experience that these gates were *always* down after ordinary bedtime; that he was running a brick yard and this caused him to go down there very often at night and to come home at all hours of the night, and he would *always* find the gates down continually; it did not make any difference whether the trains were passing or not, * * * crossed right over without hesitating because he found that was the regular condition of the gates whether a train was passing or not; did not see any effort made to raise them; has seen them down at all hours of the night after half past ten or eleven o'clock up to three or four o'clock in the morning. The gates were down and kept down, he supposed, until daylight; that when coming north at night, as a rule, he would have to get under the gates (Rec., pp. 16 and 17).

Cross-examination: After April, 1893, up to the spring of 1898, he had been in the habit of crossing the tracks at this crossing in the night-time on an average of about twice a week; some weeks he might have gone oftener than that; would return across the tracks as late as twelve to half past one o'clock. Since the spring of 1898 he has not paid a great deal of attention to these crossings, because he

did not have much occasion to cross there. He has crossed there since that time at night, but not very often. Before Landrigan was killed he had occasion to cross there quite often; that he had not crossed there late at night since that time without seeing the gates down, but could not specify any particular time when this occurred. Could not recollect ever attempting to cross the tracks going *south* and finding gates down when he did not see a train or shifting engine in sight. Going north he has found the gates down and a train, shifting engine, or car moving in the vicinity of that crossing, and sometimes he has crossed there and found the gates down when he did not see any train, car, or engine in the vicinity; * * * that he has frequently crossed there at night and found the gates down when trains were actually about to pass, and he would see the gates down without any trains there oftener than he would see them there. When the gates were down trains might have been approaching that crossing and he not have seen them, although they must have been a good way off if he did not see them (Rec., pp. 17 and 18). Redirect: That during the month of August, 1898, and subsequently thereto, he crossed there at night about twice a week, and the condition of the gates after the usual bedtime was about the same. He did not discover any difference in them as compared with what it was before Landrigan was killed (Rec., p. 19). Recross: That he had passed there prior to the accident when he had approached this crossing during the night (witness does not specify the hour) and found gates up and no trains in sight (R., p. 20).

Story: Was familiar with southwest crossing of South Capitol street and Virginia avenue, and had been traveling there about 15 or 20 years, both in the daytime and nighttime; sometimes would pass there three or four times a day; sometimes maybe only once a week; then again would be six or seven times of a night, and then might lay off a week;

that this practice had continued for 15 or 20 years; during this period had passed there at night, and had called the watchman several times to get the gates up; the gates were mostly down all the time when the trains were passing; when going home, somewhere between 12 and 4 o'clock, sometimes gates would be down, and he would have to call the watchman to get past; this was so when no trains were passing (Rec., p. 20).

CROSS-EXAMINATION: When he spoke of gates being down, he spoke from his personal knowledge; in crossing in the daytime, he found that they put the gates down when trains came along, and when trains were not coming they would put the gates up; in the night-time the most trouble he had with the gates in getting past was after 12 o'clock; sometimes they would put the gates down and maybe go to sleep, or something like that, and he would have to holler to get the gates up in order to pass by; he would not like to say positively how often *this* happened, but could clearly say it was about a dozen times; may have been more, but could clearly say it was that often; have frequently come to these gates at night, both before and after 12 o'clock, when no trains were approaching and found the gates up and crossed without any trouble, and he had done this very much more frequently than he had been stopped by the gates being down; could not say exactly whether the gates were more frequently up than down at night when no trains were passing; had noticed it about a dozen or fifteen times in passing by when he would come from a ball, or something like that; had noticed gates down and no trains passing and had to holler for the gateman; this was generally after 12 and up to 3 or 4 o'clock at night (Rec., pp. 20, 21).

Kappel: In August, 1898, was working in daytime; had worked on the night force, but not during the year 1898; had occasion to cross the southwest crossing at night, immediately prior to and about the time of Landrigan's death.

The gates as a general thing in the night-time were down. During the summer of 1898, and for five or six years previously, he had passed over this crossing three or four times a week at all hours of the night up to one o'clock, and that after 11 o'clock he generally found the gates down, whether trains were passing or approaching or not; after 11 o'clock the gates were generally kept down whether there was a train in sight or not; he and Landrigan used to go home together for 2 or 3 months; that they both worked at night at the time; that the gates were down and they had to crawl underneath the gates to get home; that the gates were generally kept down and they very seldom ever saw the gates up; that the times when Landrigan and the witness crosssed were between 12 and 1 o'clock at night and between 6 and 7 o'clock in the morning (Rec., pp. 22, 23). * * *

CROSS-EXAMINATION: That when he crossed the tracks with Landrigan at night they were coming home to lunch between 12 and 1 o'clock (Rec., p. 23); that during the year prior to Landrigan's death he crossed at this point at night after 11 o'clock on an average of about once a week or a little oftener; that he usually found the gates down whether trains were in sight or not; that he has come there after 12 o'clock at night, when no trains were in sight, and found the gates up, but very seldom; that he has found them up *only* when somebody halloaed to the man to raise them up; that after the traffic of the day was over they would put the gates down and keep them down unless somebody asked to have them raised. * * * He always found the gateman there when he was passing at night; * * * that he has crossed over at night and found the gates up when no trains were coming, *but people were passing and halloaing to the watchman to raise the gates; that the gates* were never hoisted all the way; they were on a slant (Rec., pp. 24, 25).

Martin: Was born and raised in that vicinity; lived on South Capitol street, about half a mile below southwest crossing. He always found the gates down at the southwest crossing in the summer of 1898, after 10 or 11 o'clock at night, whether trains were coming or not; *that he did not remember a single instance when he found the gates up after 10 or 11 o'clock at night;* that he had been driving up and down there once or twice a week since about 1886 (Rec., p. 25).

CROSS-EXAMINATION: The gates were *always* down, and during the fifteen years that he had crossed there he has had to wake up the watchman two or three times probably. On the other occasions when he would come there he would call to the watchman, and he would raise the gates if there was no train coming. He thought it was the custom for him to leave the gates down. He thought it was a safeguard. He did not know any better then, and deemed it a proper thing because of the small amount of use of that crossing at that time of night—*i. e.*, to have the gates raised when anybody wanted to go through if no train was approaching. If there was any doubt as to whether any train was approaching, the watchman would always call to the watchman on the other side and ask him if a train was coming; that he regarded these precautions of keeping the gates down at that time of night and of calling to the watchman on the other side to know whether a train was coming or the track was clear as a safeguard and a proper thing to do (Rec., p. 26). * * *

REDIRECT EXAMINATION: That he only found the watchman asleep two or three times, and the only difficulty he had in getting him to raise the gates occurred when the watchman was in his box late at night, *but always found the gates down* (Rec., p. 26).

Wilkinson: In the summer of 1898 resided on South Capitol street south of the southwest crossing; had been

living there about 11 years; that he had crossed at this crossing for 12 or 15 years at night-time, after the usual bedtime. The gates were usually kept down whether trains were coming or not; that he often had to ask the man to hoist the gates, and sometimes would have to wake him up; that he crossed there at night once or twice or three times a week; that he *would not like to say any instance when he found the gates up at night* * * * (Rec., p. 27).

CROSS-EXAMINATION: That he would approach the gates from the south at night-time after 6 or 7 o'clock, and usually found the gates down; sometimes there would be 2 or 3 teams waiting there—sometimes might find trains passing or that they had just passed. * * * That generally he would not stay there, but would go through and take whatever risk attached to it; that he always got through before the engine would even get in sight; had gone under the gates and over the crossing when cars or engines were approaching; that when he returned in the neighborhood of 10 or 12 o'clock at night he would generally *find the gates down; that he could not say that he has ever come down there and found the gates up when no trains, cars, or engines were moving in that vicinity;* that when he found the gates down he would just go under the gate and go on through without calling to the watchman to raise the gate (Rec., p. 27).

Oeser: In 1897 and 1898 lived on South Capitol street, south of the railroad tracks, and had occasion to pass the southwest crossing sometimes 2 or 3 times at night; that he generally crossed this crossing 15 or 16 times each week, night and day, in going to his business at the K Street market; that he has crossed there at all hours of the night from 9 until 1 o'clock at night; *that during* 1897 *and* 1898 *the gates after bedtime were kept down all the time; that he never saw the gates up after bedtime except when some one would ask to have them raised* (Rec., p. 28).

CROSS-EXAMINATION: That on 4 different occasions during

the 11 years that he lived down there he had to wake up the watchman in order to get him to raise the gates (Rec., p. 28).

REDIRECT EXAMINATION: That during the years 1897–'98 and '99 he crossed there at all hours from 6 or 7 to 12 o'clock at night and 3 o'clock in the morning; that sometimes he would find a train there and sometimes he would not, *but would always find the gates down* (Rec., p. 28).

Tripp: In the summer of 1898, including the month of August, the gates at this crossing, after the usual bedtime, were mostly kept down; that he has seen them down at 9 o'clock, and presumes that they were kept down all night. *Every time he saw them they were down, whether trains were passing or not* (Rec., pp. 29 and 30).

CROSS-EXAMINATION: That when people approached the crossing at night and wanted to cross, if they were walking, they would generally stoop under the gates and walk across. If driving, they would have to holler to the watchman to raise the gates; that he has seen this along in the summer of 1898; that they would be up at times, but always down when trains were passing (Rec., p. 30).

B—LANDRIGAN'S KNOWLEDGE OF THE CONDITION AND OPERATION OF THE GATES AND HIS ACTS AND CONDUCT IN ACCORDANCE THEREWITH.

See testimony of plaintiff (Rec., p. 31) and of witness Kappel (Rec., pp. 21, 22, 23).

C—LEGAL EFFECT OF SUCH A CUSTOM ON THE CONDUCT OF DECEASED IN GOING UNDER THE CLOSED GATES.

Assuming for the purpose of the argument that the plaintiff succeeded either in establishing such a custom with reference to the gates, or that the testimony on that point was sufficient under the rule to go to the jury, it is respectfully

submitted that going under the gates, considering the facts of this case, was not negligence *per se.*

The principle underlying the general rule that such conduct would of itself be negligent is obviously based on the assumption that the gates are *live* gates; that they are operated in accordance with the purpose for which they are ordinarily put at railroad crossings, viz., to be lowered and closed as an indication of present danger—as a note of warning that a train or locomotive is passing or approaching, and to be raised and opened when no danger is imminent.

For one to undertake to cross the track or tracks in the face or in defiance of a distinct announcement that a train is in sight and about to go over the crossing would be negligent, reckless, and foolhardy, and a case arising out of such a state of facts would not be submitted to a jury to discuss and decide—the question would be answered by the law.

It would be wholly immaterial whether the note of warning to the pedestrian was given by a watchman, standing at the crossing, who, seeing the approaching train, should, in *words*, inform the traveler of the presence of the specific danger, or, by the waving of a red flag, should announce the train's approach, or by lowering safety gates should thereby give out the same information.

The negligence consists in going when he is told not to go!

But how different would be the situation and our characterization of the conduct of the pedestrian if the watchman should continuously, by day and by night, cry "wolf!" whether the "fold" was in danger or not, or should wave his flag of peril without regard to the presence or absence of trains and locomotives, or should lower his gates and keep them lowered throughout the hours of the day and night—lowered when trains were passing or approaching and still down when no danger anywhere existed! When a danger signal thus becomes no real signal of danger, then no neg-

ligence is to be imputed to the traveler who knows the fact and acts upon it.

Cessante ratione legis cessat et ipsa lex. A fortiori, when a signal ceases to be used for the object it was intended, it ceases to indicate that object.

This court, passing upon the effect of a custom, in the case of Dashiell *v.* Market Company, 10 App. D. C., 81, 89, said:

"If there had been any proof of usage or custom on the part of the market men to use this elevator themselves, with the sanction, express or implied of the defendant company, the case would have been very different; but there was no such proof."

Mr. Justice Morris, delivering the opinion of the court, thus states the facts of the case:

"In the market building was an elevator used for the purpose of conveying tenants and their employees from one floor to another of the building in the course of their business, the fact apparently being that, while the main business was conducted on the lower or ground floor of the market, the dealers kept their supplies, or part of them, on the second or the upper floor, to which access was had by this elevator, as well as also by means of a staircase. There was an elevator boy employed by the appellees to operate the elevator, but this boy was often absent, and in that event, the tenants and their employees often operated the elevator for themselves.

"Against so doing, however, they had been warned by the officers of the company, but whether any such warning had ever been given to the deceased, or had been heard by him, does not appear."

It further appears that one Sakers, an employé of a tenant of the market company, undertook to operate the elevator, and, owing to its peculiar construction and the worn and defective condition of the rope by which it was operated, the rope broke, the elevator fell, and Sakers was caught between the elevator platform and door, and received injuries from which he died.

The court held that the deceased was guilty of contributory negligence in entering the elevator and undertaking to operate it on his own account, and the quotation from the court's opinion on the subject of custom or usage bears upon that direct question.

Appellants chiefly rely on two cases to support their contention that the customary condition of the gates is an immaterial matter, viz., Douglas *v.* R. R. Co., 100 Wis., 405, and Sheehan *v.* R. R. Co., 166 Pa. St., 354.

An examination of these cases will readily show that they have no real application here.

The Douglas case simply and only decides that "*what persons customarily do under similar circumstances has no application as a test of ordinary care, where the act is so obviously dangerous as to constitute negligence as a matter of law.*"

We quote from the statement of facts :

"The evidence tended to prove that at a Becker Street crossing of the defendant's railway right of way in the city of Milwaukee, it maintained its railway tracks with a gate on each side of the right of way, so operated that when the crossing was about to be used for the passage of trains, *the gates were let down so as to bar the approach to the track for the entire width of the street;* that plaintiff was familiar with the crossing and the purpose for which the gates were used; that pedestrians were accustomed, notwithstanding the operation of the gates, to enter upon the right of way as in their judgment circumstances would permit; that on a dark night between the hours of nine and ten, plaintiff approached the crossing by way of the street from the east; *that as he arrived at the gate it was let down, but he, notwithstanding, passed around it and proceeded to cross the right of way.*"

Referring to "live" gates, as these unquestionably were, the comment of the court in the opinion is peculiarly apt:

"Where gates are *so maintained,* it is the duty of travellers on approaching the right of way and observing that the gates are down or about to be let down, to stop until they

are raised before proceeding. The presence of a gate across the approach to a railway track says to the traveller, in a manner not to be misunderstood, that such tracks are presently to be used for the passage of trains."

To apply such language to gates that were "dead," so to speak, for the time being—that indicate nothing one way or the other as to danger or safety—would not only be inapt, but unreasonable. Can it be claimed that the presence of the gate across the southwest crossing of South Capitol street, under the facts of this case, was tantamount to a declaration by the defendants—

"to the traveller, in a manner not to be misunderstood, that such tracks are presently to be used for the passage of trains"?

The Sheehan case is of but little value and has but little application to the facts of this case.

Three important facts should be noted in connection therewith:

(1.) It nowhere appears in the statement of facts or in the opinion of the court that the party injured had any knowledge of the custom to keep the gates lowered, or that he acted upon such custom or usage.

(2.) The plaintiff went under the gates and crossed the railroad, with the track in full view, and there was no obstruction whatever at the point of the accident, and the case largely turned upon the fact that the plaintiff could not be said to have looked and listened, and that the crossing of the railroad track, apart from the gates, under the circumstances of the case, was contributory negligence on his part.

(3.) The tracks in question were live tracks, not only used habitually for the passage of trains, but over which a train, in full view, was then in the act of passing—not a dead track.

(4.) There is but one line of comment in the opinion of the court upon the effect of the gates being customarily down, and it is evident from the perusal of the opinion that no sort of consideration is given to that fact. It may have been because it was unnecessary to have considered the effect of such a custom, inasmuch as the crossing of the track itself without looking and listening was held to be negligence *per se*, wholly independently of the condition of the gates.

DUTY TO LOOK AND LISTEN BEFORE ATTEMPTING TO CROSS RAILROAD TRACK.

A—Presumed to Have Looked and Listened.

The duty of one before attempting to cross a railroad track to look and listen for the approach of trains is so well settled and is so reasonable that no attempt on the part of the appellee is made to combat it; but it is equally well settled in this jurisdiction, both by the Supreme Court and the Court of Appeals, that, in the absence of any evidence to the contrary, *it is to be presumed in favor of the deceased that he did so look and listen.* The Supreme Court of the United States, in Continental Improvement Co. *v.* Stead, 95 U. S., 161, 194, stated the rule as follows:

"Those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentive to caution, for their lives are in imminent danger if collision happen; and *hence it will not be presumed without evidence that they do not exercise proper care.*"

And this court, in Cowen *v.* Merriman, *supra*, following the rule adopted by the Supreme Court, said:

"Whether he (deceased) did or did not look and listen for the approach of the trains, before stepping upon the tracks, nowhere appears from the evidence, except as it may be inferred; and in the absence of negative evidence, or evi-

dence that he did not look and listen for the approach of trains the presumption would be that he did." Following Tex. P. Rwy. Co. *v.* Gentry, 163 U. S., 353, 366, and Continental Improvement Co. *v.* Stead, 95 U. S., 161, 164.

B—Does the Evidence Rebut This Presumption that He Looked and Listened?

This is the sole question remaining. In order to justify the *trial* judge in instructing for the defendant, the evidence rebutting the presumption that deceased looked and listened must be so strong and conclusive "that all reasonable men would so conclude."

In order to pass safely upon this question, it is not only proper, but necessary, that all the facts and circumstances surrounding the occurrence should be taken into account, among them the following:

A—The Condition of the "Ladder" Track at the Place Where Landrigan was Injured, the Use for Which That Portion of the Track was Employed, and His Knowledge of These Facts.

The following extracts from the testimony on that point justifies the court in submitting the condition and use of that portion of the ladder track to the jury:

Motley: The end of this "ladder" track, in the neighborhood of South Capitol street, was used for shifting purposes and for putting cars or anything there they wanted to store there; has never seen passenger coaches stored down there, because it is not long enough for that; the only cars he ever saw stored there were freight cars (Rec., p. 8).

It was not customary to handle passenger cars on that side, at the southwest crossing of South Capitol street. Witness and his men were freightmen ordinarily, but are called upon now and then to handle passenger cars (Rec., p. 9).

Webster: South Capitol street is divided by the reservation in the center of it, which is about 50 or 60 feet wide, thus making two crossings (Rec., p. 16). The most southerly of the four tracks at the crossing (southwest) goes as far as the storage yard of the company extends. The company has a railroad yard there, where they store railroad cars, rails, coal, etc. The south track extends westerly about 200 feet beyond the southwest crossing. He calls it a dead track, because it does not lead anywhere; it just stops. The westerly end of this track from the southwest crossing is used to put in coal, railroad ties, iron, etc., for the use of the company; that is all it is used for. They put coal in there and unload it, and when they want it for their switch-boxes they haul it around to them. No portion of this track lying west of the southeast crossing is used for shifting or making up trains. That he has lived there all his life and has never seen any shifting or making up of trains at that point; has seen two or three flat cars there, or a load of coal or cinders, or a car containing railroad ties or iron rails. That they did not store their passenger cars there; they took them further east (Rec., p. 17).

CROSS-EXAMINATION: Has seen the company shifting cars on the "ladder" track west of the southwest crossing of South Capitol street, but they were cars loaded with coal, lumber, rails, or something for their own special use, and bases this statement upon his observation year in and year out. These cars were left there. He has seen them shifted in, but could not say that he has seen them pulled out, but he is satisfied that this was done. That it would be necessary to pull them over this crossing in order to get them out. * * * As a rule, they contained coal, rails, and such stuff as that, and he assumed the material contained in the cars belonged to the company, because it was put in the company's yard, but as a matter of fact does not know of his own knowledge that the end of that track was used simply

for the cars containing material belonging to the company (Rec., p. 17).

REDIRECT EXAMINATION: That he supposed the railroad company owned the material that was unloaded or stored at the end of the yard on that "ladder" track because he has seen them haul coal around to the switch-box for the men to use and naturally supposed it was their material; that there is no freight yard there. It is a private yard. They use this track in connection with the storage yards of theirs (Rec., p. 19). The shifting in front of his house was generally done on the north track; that they could only go about half way of the block on the south track (Rec., p. 20).

Kappel: That the portion of the "ladder" track lying west of the southeast crossing is used for storing gravel cars and unloading coal. When they unloaded it they shoved it down there alongside of the property yard of the railroad company and put it right over the fence. It was never used for shifting or for making up or breaking up trains or for storing passenger cars. The portion of this track east of the tower was used for shifting cars. The portion west of the tower was hardly used at all—just for storing a couple of cars down there. * * * The "ladder" track west of the southeast crossing is always rusty, and the track that is used for shifting purposes is always bright (Rec., p. 22).

CROSS-EXAMINATION: He notices the rust upon the south track nearly every time he passes there; noticed it "this morning;" there are four rails there that are bright—two are rusty and two others are not so rusty; has noticed this condition ever since he has been crossing there for the last 20 years; this rust was west of the southwest crossing; did not testify about the rust on the tracks at the former trial, because he was not asked the question; was asked about it this morning by plaintiff's counsel for the first time; the south track is pretty well rusted—is rusty all the time; he

knows two tracks are bright, and the track furthest north not as bright as the middle tracks (Rec., p. 23); the western end of the south track was used for storing cars and taking cars in and out for the purposes of the property yard; has seen these cars lie there two or three weeks after they were unloaded; they might have taken the cars out immediately after pushing them in, but did not see them take them out; the two cars that were on this track when Landrigan was killed had been there two or three days; that he did not know whether or not these cars had been pulled out and put back during these two or three days, but he noticed the number of one of the cars and the other looked like the same car (Rec., p. 23). * * * that this track was only an outlet to the east, but in this respect it is similar to every other track in the yard; the only way it differs from them is that it is about eight or ten hundred feet from any switch along there; on the east this track communicates with every other track in the yard by a switch (Rec., p. 24).

REDIRECT EXAMINATION: There was no shifting and making up or breaking up of trains on the southwest crossing on the south track; that this was done east of that crossing, and the only trains that crossed there, freight or passenger, were the trains that were already made up; that once in a while a passenger engine comes down from the Jersey yard, on the north side of the crossing, and switches off on another track to get a car or something like that (Rec., p. 25).

Martin: Has seen a couple of cars standing on the south track west of the southeast crossing, but has never seen them make up trains there.

CROSS-EXAMINATION: Has seen cars run in on the south track and left there, but had never seen them pulled out; had caught cars on this south track near this crossing once or twice a week—cars that he had seen there contained coal; had frequently seen them move cars backwards and for-

wards across the southwest and southeast crossings of South Capitol street. Sometimes trains were made up there and sometimes trains came up from the other [end this has reference to the use of the tracks generally and not specially to the "ladder" track] (Rec., p. 25).

REDIRECT EXAMINATION: Saw them making up and breaking up trains to the east of the crossing, but they would pull cars over the crossing sometimes when they had a long train; that he believed he had seen trains crossing at that crossing more frequently in the daytime than in the night-time.

RECROSS-EXAMINATION: He had never seen much shifting done there at night (Rec., p. 26).

Wilkinson: The end of the south track is generally used to stack cars.

CROSS-EXAMINATION: He had seen cars stacked in there most always when he would pass there; can only recall seeing them move cars in there on one occasion (Rec., p. 27).

Oeser: That the end of the south track west of the southeast crossing of South Capitol street was generally used for coal cars; that they made up and broke up trains to the east up at New Jersey avenue; had never seen them making up and breaking up trains as far west as the southwest crossing of South Capitol street (Rec., p. 28).

Miller: The south track west of the southeast crossing of South Capitol street he has always considered as a storage yard, running from New Jersey avenue, parallel to the property yard; he has never known them to make up a train there; the trains are made up further east, east of the southeast crossing.

CROSS-EXAMINATION: That by storage track he meant that very frequently the cars containing railroad supplies stood there for a number of days without being unloaded; that

he never knew a car to be put in there except for the company's purposes; has often seen cars pushed in and pulled out of there over the southwest crossing of South Capitol street. Redirect: Where they make up their passenger trains (Rec., p. 29).

Tripp: The south track, known as the ladder track, west of the southeast crossing, was not used for anything but storage, as far as he knew; does not think they could use it for making up and breaking up trains, because it does not run over 200 or 250 feet from the southwest crossing; that they stored their passenger cars in the Jersey yards where they make up trains, and also on the north track on Virginia avenue to the east of the southeast crossing, where they make up trains; that the western end of the south track was used mostly for the storage of coal, as he supposed, for the use of the railroad company (Rec., p. 29).

Mrs. Landrigan: About two weeks after her husband's death she viewed the spot where the accident happened and noticed that the rails of the south track at that point were rusty; that this rust extended from the end of that track to the southeast crossing; that east of the southeast crossing the tracks were brighter; that the two center tracks at the southwest crossing were very bright, but the track on the north was not quite so bright as the center tracks. She has seen cars loaded with coal and railroad ties standing at times on the south track west of the southeast crossing; that this portion of the track was not used for switching purposes (Rec., p. 31).

As to the ladder track, at the point where the accident occurred, it is indisputed in the evidence that it was only used to store and stack freight cars, that passenger coaches were never stored there, and that no shifting (*i. e.*, making up and breaking up trains) of either freight or passenger cars was done on that end of this track. It surely cannot be said with any

force or show of reason that the degree of care imposed upon Landrigan by the law was the same in crossing this track, little used at this point as it was, as it would have been in crossing a such a track as that involved in the case of Shehan *v.* R. R. Co., *supra.*

B—The Character of the Night—Obstructions to the View—Lights on the Car and in Vicinity of the Crossing.

The testimony, compiled carefully from the record and bearing on these points, is as follows:

Motley: There was a white light in the vestibule of the Pullman car that broke away—in the little dome-shaped arrangement in the roof of the car. This was the only light hanging in the vestibule, and there was no light on the platform. * * * (Rec., p. 8).

The crossing was lighted by the street lamps located at each of the four corners, and there was an electric light in the reservation north of the tracks [at northeast intersection of South Capitol street and the railroad tracks] and another one south and east of the tracks near the signal tower (Rec. 9).

The lamp in the dome of the vestibule of the Pullman car had a white shade or globe underneath. It gave a bright light; you could see it all right. The lamp was inside of the door, and the door was closed. The glass in the door extended about half-way down, and the light shone through the glass in the door. You could see the light very plainly as you looked at it. The same sort of light was in both ends of this car (Rec., p. 10).

Redirect Examination: The nearest electric light to the point where Landrigan was killed was on the east side of the southeast crossing and north of the tracks. This light was about seventy-five yards from where Landrigan was struck (Rec., p. 10).

Willhoit: It was dark, night-time, and witness could not see (Rec., p. 13). There was a light on both ends of the coach. There was a light in the coach, but none on the back platform (Rec., p. 14).

Witness did not stop, because by the light being in the car he thought perhaps there was a porter or somebody in there (Rec., p. 15); knows there was a light in the west end of the car, the end going toward South Capitol street, which was the front end of the car the way it was moving. This light could be seen more plainly than a lamp. Such lights contain two burners, are lighted by oil, and are more brilliant than a lantern. The reflector is over the top of the light. There is a kind of white shade over them (Rec., pp. 15–16). * * *

REDIRECT: The light in the vestibule of the car could be seen by people on the ground. It hung down low and did not set right up in the dome. It had a shade over it, but he does not know whether you could call it a reflector or not. It was plain enough to be seen by anybody who was on the ground.

Webster—CROSS-EXAMINATION: Standing at the gate on the south side of the southwest crossing the gateman's box would break the view down this side track to the east, if you stood outside of the gate. You could look up the main track, he supposed, to New Jersey avenue, but he thought the watch-box would break your view of the south track to the east to a certain extent, if you were standing outside the gate. This box is 6 or 7 feet square. He could not say that a watch-box 6 feet square would prevent yon from seeing a train if it was coming along, but it would break your view, to a certain extent, in looking up the track; that when you stood on the inside of the gate, on the open space, you could look straight up the side track to the eastward, and there was nothing to break your view (Rec., p. 18).

REDIRECT EXAMINATION: Standing outside of the gates on

the south side of this crossing two cars loaded with coal or other material on the end of this track would obstruct the view of a train coming from the depot, and you would have to get out on the track if you wanted to look up the track a couple of hundred yards; that the watchman's box indicated on the map was right close to the ladder track, and farther up along that track is the tower-house, which is 25 or 30 feet high. This would have about the same effect to obstruct the view as the smaller watchman's box; it would not break the view of a train coming, but would obstruct the view and you would not have a clear view of the track; you could see one coach looking up there. * * * Witness stood on the ladder track on one occasion when the midnight express for New York was passing, and he considered it a safe place (Rec., p. 19).

There was an electric light on the north side of the southeast crossing, about 200 feet from where Landrigan was killed; had never noticed whether this electric light furnished any light of any consequence at the intersection of South Capitol street southwest; that if a train was standing on the north track, a few feet from the southwest crossing, it would have the effect of making it darker at the gates at the southwest crossing (Rec., p. 22).

CROSS-EXAMINATION: When he got there at night and found the gates down, he could not see whether there was a train in sight until he got out on the track and looked up and down; * * * the watch-box south of the ladder track interfered with the view down that track to the east; the closer you get the greater the obstruction from this box and the further away the more view you had of that track; that he thought standing inside of the gates, the watch-box located outside the gates and next to the fence south of the track would prevent a person seeing anything up that track; that you would have to get on the track before you could see up there on account of this watch-box, the fence, and

telegraph pole which were there; that west of the southwest crossing towards F street there is a curve; that you could not see around that curve until you got on the north side of the crossing; that although you could not see a train coming from that direction until you crossed the tracks, you could hear it unless there were two or three trains passing at the same time, or an engine blowing off steam; then you could not hear anything (Rec., pp. 24, 25).

Martin—RECROSS-EXAMINATION: When he approached the south side of this crossing in the daytime, it would be impossible to see towards the west, and very seldom to the east on account of the watch-box. * * * Re-redirect: The tool-house and lumber yard west of the crossing would prevent a person approaching the gate from the south from seeing an approaching train from the west; that if there were two cars standing on the south track he would be unable to see a train coming from the west unless he got outside of that track; that it would be harder to see at night than in the daytime (R., p. 26).

RE-RECROSS-EXAMINATION: Approaching this crossing from the south, after passing the gate and standing upon the space between the gate and the south track, there was nothing to obstruct the view unless a box car should happen to be standing there to the east; that the watch-box would not obstruct the view (Rec., p. 27).

Miller—CROSS-EXAMINATION: By going out on the first track you could get a very good view in both directions—probably further to the east than to the west; that if the west end of the track were occupied by cars a person could not see any distance at all, and you would have to go past the cars that might be standing on that track. If you passed under the gate and were standing on the open space between the inside of the gate and the south rail of the southernmost track, you could see to the east a distance of about 100 feet or more (Rec., p. 29).

Jenkins: A Pullman car running slowly, as fast as a man would ordinarily run on a straight track, would make practically no noise at all—very much less noise than an ordinary passenger car; they were built purposely for that object; they are very much heavier than passenger coaches and more staunchly built; they are built with a longer truck and wheel base and softer springs; that the light in the vestibule of a Pullman car is so located as to illuminate the platform only; that is the purpose of that light; it does not throw the light more than a couple of feet beyond the end of the bumper of the car; it is not intended to illuminate the track (Rec., p. 30).

CROSS-EXAMINATION: Such a light was not intended for a locomotive headlight; that if a man was standing on the track some distance from the advancing end of a car showing such a light he would not see the source of the light, but would see the reflected light on the platform on the car; he could see the illuminated end of the car. If he was not looking exactly in that direction this light would not attract his attention away from something else; that if he were looking up the track he could see the light, if he were not too far away (Rec., p. 30).

Mrs. Landrigan: The night her husband was killed was dark and cloudy (Rec., p. 31).

C—THE PASSING, AT OR ABOUT THE TIME OF THE ACCIDENT, OF THE MIDNIGHT EXPRESS FOR NEW YORK, KNOWN AS NO. 78.

Willhoit—DIRECT EXAMINATION: Train No. 78, which left the depot about 11.55 or 11.35, was passing there about the time of the accident. This train No. 78 is known as the midnight express for New York, and crossed South Capitol street, where Landrigan was hurt, going in an easterly direction (Rec., p. 12).

CROSS-EXAMINATION: Witness jumped off the Lylete on the southeast side of South Capitol street; 78 passed first, and then he ran down the north-bound track behind the "Lylete" (Rec., p. 15). * * * The runaway car passed the southwest crossing of South Capitol street before No. 78 reached there. It struck just the middle part of No. 78 as the train came by there. The runaway car had just about gotten across the crossing when the engine of No. 78 began to cross the crossing. It was almost at the same time (Rec., p. 16).

Landrigan had been in the employ of the defendants for 8 or 9 years, in the round-house, as machinist. It can and should be assumed that he knew well the conditions in and about the "Jersey yards"; the character of the "ladder" track, the use to which the portion of it west of the southeast crossing was put; the fact that Pullman and other passenger coaches were never stored or stacked as far west as the southwest crossing of South Capitol street, and that no shifting was ever done on that end of this track.

No one saw the accident; it can never be known whether or not Landrigan looked and listened, but is it not fair to assume that, knowing the conditions just above stated, he did look and, looking, saw the train of passenger coaches in Motley's charge going *east* along the ladder track, away from the crossing where he was to pass? Would he not have a right to infer that the coach or coaches would not come *west* if he saw the train *already* going *east* and knew that no shifting was done at or near the southwest crossing and that no passenger or Pullman cars, such as Motley's train consisted of, were ever shifted or stored at the crossing, or caused to pass over it?

There is another factor to be reckoned with in passing upon this question, to wit, the passing, at that time, of No. 78.

Landrigan may have looked and seen the shifting train

going *east* and *from* him, as suggested above, or he may have looked at the moment of attempting to cross the ladder track, where his vision was obscured by the smoke from the locomotive of No. 78, blown across the ladder track, the character of the light in the "Lylete" increasing the probability of just such an obstruction. He may have listened and the roar and rush of the passing express destroyed the little noise the slowly moving Pullman made as it came down this ordinary grade of the "ladder" track. He may have gone under the gates, stood on the vacant, safe place between the gate and the "ladder" track to ascertain the approach of No. 78 (for the witnesses say he would have to do this to have a view unobstructed), and, seeing No. 78 *coming toward him* and the shifting train *going from him*, awaited the passing of the former, and, as its rear coach cleared the crossing, looked up the "ladder" track (*again* or for the *first* time, no fact or circumstance disclosing which), heard nothing, saw nothing, for the reasons already stated, undertook to cross the ladder track, and then the "live" tracks, and at that moment was struck by the runaway Pullman.

Can it be said that the evidence here is so strong that the deceased did not look and listen "that all reasonable men must draw the same conclusion"?

How strikingly like the case at bar are the facts of the Merriman case. Mr. Chief Justice Alvey thus states them:

"It is shown, however, that the condition of things existing at the crossing of the road at L street, where the accident occurred, was not favorable to entire safety to those using the crossing. It was near midnight that the accident occurred; the weather was blustering, and there was no moonlight, and some of the witnesses speak of the night as cloudy and dark, but others say it was clear. The gates at the crossing were raised, and there was no watchman or light at the crossing. There was a passenger train coming into Washington that passed over the crossing just before the deceased reached it and attempted to pass over it. At the

same time, coming out of Washington and going in the direction of Baltimore, were an engine and tender, and the proof is conflicting as to whether this engine and tender were running head or tender foremost. It was this engine with the tender that collided with the deceased and caused his death; the collision occurring at or near about the crossing. The meeting and passing in opposite directions of the passenger train, going into Washington, and the engine and tender going in the direction of Baltimore, occurred west of, but not very far from the crossing of L street. Some of the witnesses speak of smoke emitted from the passenger train, but others do not seem to have observed it."

The comment of the Supreme Court upon the brief of counsel for railroad company in the Gentry cases furnishes such a conclusive answer to much of appellants' brief in this case that we quote the following therefrom:

"The counsel for the defendant, in their elaborate brief, say: 'Plaintiffs below cannot claim that the headlight of the engine did not illuminate and make plain to any one the flat car. They may contend that the headlight blinded the deceased. If this be true, he knew that switch-engines with flat cars attached in front and behind them were continuously moving in and about the yard, and if the light did blind him he knew then and there the blinding effects thereof, and it was as careless for him to step upon the track just in front of a car as it would have been for a blind man to have so acted. We submit that if he was blinded by the headlight that he was guilty of the grossest negligence, being blinded, in walking upon the track under the existing circumstances. We submit, however, that the evidence shows without contradiction that, by the exercise of ordinary care, he could have seen the flat car. We submit that a blind man who would attempt to cross the track just in front of the engine, the puffing and blowing of which he could hear, hoping to get across the track before the engine could strike him, would be guilty of the grossest negligence. In this case the deceased was not blind. He could see the engine with its headlight illuminating 15 or 20 feet of the flat car next to the deceased, and lighting up the track for some distance ahead."

"It is sufficient to observe that the evidence touching the matters referred to by counsel was not so clear and satisfactory as to justify the taking of the case from the jury upon the issue whether the deceased exercised due care under the circumstances which attended the occasion. It was properly left to the jury to determine whether, under all the circumstances, the effect of the headlight and flat car combined was to make the situation secure and safe to one who saw the headlight, but did not see the flat car in front of the locomotive. 'What may be deemed ordinary care in one case,' this court has said, 'may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court'" (Texas & Pacific R'w'y Co. *v.* Gentry, 163 U. S., 353).

Very little need be said of the complaint by appellants that the trial court refused sundry prayers offered by defendants and granted sundry prayers offered by plaintiff. They raise, in effect, the same question as that heretofore discussed, viz., whether it was error to refuse the motion to instruct the jury to return a verdict in favor of defendants.

Something has been said about error having been charged in the refusal of the court to instruct the jury in the exact language selected by counsel for defendants. Mr. Justice Bradley, in The Continental Improvement Co. *v.* Stead, 95 U. S., 161, disposes summarily of this sort of contention.

"But a judge is not bound to charge upon assumed facts in the *ipsissima verba* of counsel, nor to give categorical an-

swers to a juridical catechism based on such assumption. Such a course would often mislead the jury instead of enlightening them, and is calculated rather to involve the case in the meshes of technicality, than to promote the ends of law and justice. It belongs to the judicial office to exercise discretion as to the style and form in which to expound the law and comment upon the facts."

And referring specifically to one of the prayers offered, adds:

"It states such duty with the rigidity of a statute, making no allowance for modifying circumstances or for accidental diversion of the attention to which the most prudent and careful are sometimes subject; and assuming, in effect, that the duty of avoiding collision lies wholly or nearly so on one side."

It is submitted that there is no error disclosed in the record, and that the judgment of the court below should be affirmed.

J. J. DARLINGTON.
CHAS. A. DOUGLAS.
JOS. D. WRIGHT.